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PROCEEDINGS AND ORDERS

DATE: [01/13/94]

CASE NBR: [93106431] CFH

STATUS: [DECIDED]

SHORT TITLE: [Bush, John Earl]

VERSUS [Singletary, Sec., FL DOC] DATE DOCKETED: [101893]

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PREVIOUS

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EXIT

OCTOBER TERM, 1993

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ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
Case No. **93-6431**

Supreme Court, U.S.
FILED
OCT 18 1993

OFFICE OF THE CLERK

JOHN EARL BUSH,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

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SUPREME COURT, U.S.

63 P12

QUESTIONS PRESENTED

(I)

- a) Whether the conflicts between the Eleventh Circuit's approach and this Court's standards in Enmund v. Florida, Cabana v. Bullock and Tison v. Arizona warrant this Court's review.
- b) Is a state court "sufficiency" ruling -- that a defendant's "participation" with his codefendants can be substituted for a finding on the defendant's mental state -- enough to satisfy Enmund v. Florida, Cabana v. Bullock, Tison v. Arizona and the eighth amendment?
- c) Should Tison and Bullock still be construed to require express state court findings on the defendant's mental state or should the Eleventh Circuit's approach be deemed sufficient?
- d) Can a death sentence be sustained under the eighth amendment when the state courts have not expressly found that the defendant intended to kill or was recklessly indifferent to human life but, rather, when the state supreme court has found that the "only known version of the events" is that the defendant did not intend to kill?

(II)

- a) Whether the standard fashioned by the Eleventh Circuit -- that a petitioner must point out actual "evidence" of confusion in a jury's deliberations to support a claim that capital sentencing instructions were inaccurate and misleading -- is sustainable under this Court's law and the eighth amendment.

- b) Whether the standard applied by the Eleventh Circuit to address Petitioner's claim that his capital sentencing jury was inaccurately instructed is in conflict with this Court's precedent in cases such as Caldwell v. Mississippi, Mills v. Maryland, McKoy v. North Carolina and Beck v. Alabama.
- c) Whether the instructions afforded Petitioner's jury as to its vote at capital sentencing were misleading and inaccurate and whether they violated the eighth amendment.

(III)

- a) Whether the conflicts between the standard employed by the Eleventh Circuit to evaluate claims of ineffective assistance of counsel in Petitioner's case and other cases and the standards established by this Court in Strickland v. Washington warrant the granting of certiorari review.
- b) Whether an attorney's asserted "tactic," no matter how uninformed, uninvestigated, or unreasonable insulates that attorney against a claim of ineffective assistance of counsel at capital sentencing.
- c) Whether the actions of an attorney who fails to investigate for capital sentencing and testifies that he had no tactical reason for failing to investigate can nevertheless be construed to amount to a "reasonable" strategy under Strickland v. Washington.
- d) Whether the Eleventh Circuit's cursory, two-sentence summary ruling on the issue of prejudice comports with the standards established by this Court in Strickland v. Washington.

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ORIGINAL

OCTOBER TERM, 1993

IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 93-4131

Supreme Court, U.S.
FILED

OCT 18 1993

OFFICE OF THE CLERK

JOHN EARL BUSH,
Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, John Earl Bush, through counsel, prays that the Court issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993).

The Court of Appeals allowed Mr. Bush's death sentence to stand by a vote of 2-1. See Bush, 988 F.2d at 1093-97 (Kravitch, J., dissenting); see also id. at 1082 (majority opinion). Mr. Bush timely sought panel rehearing and en banc review. The petition was denied. On August 9, 1993, the Court of Appeals stayed its mandate in order to afford Petitioner the opportunity to seek certiorari

review in this Court. The Court's stay of mandate was predicated upon Fed. R. App. P. 41 and its counterpart, 11th Cir. Rule 41-1, which state in relevant part that "[o]rdinarily [a request for stay of mandate pending certiorari review] will be denied ... unless a substantial question is to be presented to the Supreme Court" The substantial nature of the questions involved; the conflicts engendered by the Court of Appeals' majority opinion, an opinion which will affect future cases in that Court; and the need for resolution by this Court are discussed in the body of this petition.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals upheld Petitioner's death sentence by a 2-1 vote. The opinion is reported as Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993). Judge Kravitch's dissent is reported at Bush, 988 F.2d at 1093-97. The opinion is included in the Appendix to this petition at Att. A.

Petitioner sought rehearing and en banc review. The discussion provided to the Court of Appeals by that petition is excerpted in the Appendix at Att. B. The summary order of the Court of Appeals denying the petition (July 20, 1993) is included in the Appendix at Att. C. The order of the Court of Appeals staying issuance of the mandate pending certiorari review in this Court was issued on August 9, 1993, and is included in the Appendix to this Petition at Att. D.

The opinion of the Supreme Court of Florida on direct appeal of the proceedings resulting in Petitioner's death sentence,

discussed in the text of this petition, is reported as Bush v. State, 461 So. 2d 936 (Fla. 1985), and is included in the Appendix at Att. E. The Florida Supreme Court's opinions on state court post-conviction review (state habeas corpus and Fla. R. Crim. P. 3.850) are reported as Bush v. Wainwright, 505 So. 2d 409 (Fla. 1987), and Bush v. Dugger, 579 So. 2d 725 (Fla. 1991), and are included in the Appendix at Att. F and Att. G. The Order of the United States District Court for the Middle District of Florida is not reported. It is included in the Appendix at Att. H.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was issued on March 20, 1993. Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993) (Att. A). Petitioner timely filed for rehearing and en banc review (Att. B). The Court of Appeals denied rehearing and en banc review on July 20, 1993 (Att. C). On August 9, 1993, the Court of Appeals stayed its mandate in order to afford Petitioner the opportunity to seek certiorari review in this Court. The Court stayed the mandate to and including October 18, 1993, pending the filing of this certiorari petition and thereafter pending this Court's ruling (Att. D). The filing of this petition is timely under this Court's rules and is within the time period set by the Court of Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States of America provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right(s) to a ... trial, by an impartial jury ... and to have the assistance of counsel

The Eighth Amendment to the Constitution of the United States of America provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States of America provides in relevant part:

No state shall ... deprive a person of life, liberty, or property without due process of law.

Fla. Stat. section 921.141 (Florida's capital sentencing statute) sets forth Florida's capital sentencing scheme and is also relevant to the questions presented by this petition.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Four tape recorded statements obtained by law enforcement officers from Mr. Bush were played during the trial. These statements "constitute the only known version of the events" Bush v. State, 461 So. 2d 936, 937 (Fla. 1985). The statements were

to the effect that [Mr. Bush] did not realize that his accomplices, Alfonso Cave, "Pig" Parker and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination. Bush states that after the robbery, they drove toward Indiantown, when his accomplices ordered him to stop. The victim was pushed out of the car and Bush avers that he intended to set her free. However, the accomplices decided that Slater might be able to identify them and they told Bush to dispose of her. Bush, not

desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially. Slater fell to the ground and an accomplice, Parker, shot her.

Bush v. State, 461 So. 2d at 938. The testimony of the medical examiner, Dr. Wright, confirmed that the knife wound was superficial (ROA 465) and that Ms. Slater died as a result of a gunshot wound (ROA 471).¹

After being instructed on felony-murder and accomplice liability theories, the jury convicted. Defense counsel knew that the sentencing judge intended to impose the death penalty. Defense counsel, however, had developed no evidence in mitigation and presented none at sentencing. Defense counsel "failed to conduct even a minimally adequate search into Bush's background," Bush v. Singletary, 988 F.2d 1082, 1094 (11th Cir. 1993) (Kravitch, J., dissenting); "did not conduct a constitutionally adequate investigation into Bush's background and [consequently] did not introduce significant evidence that could not reasonably have given rise to damaging rebuttal," id. at 1096; "had every chance to develop mental health mitigation but neglected to do so," id. at 1095; "was inexcusably unaware of information that would have explained [Mr. Bush's record]," id. at 1095; and "abdicat[ed] ... his responsibility to investigate and present mitigating evidence ... in a way sufficiently egregious to implicate Bush's right to constitutionally effective counsel." Id. at 1096. As Judge Kravitch outlined:

¹ "ROA" refers to the state court record on direct appeal filed in the Florida Supreme Court and thereafter in the United States District Court and Eleventh Circuit Court of Appeals.

At the evidentiary hearing in the district court, Muschott [trial defense counsel] conceded that he prepared no mitigating evidence whatsoever to present at sentencing. Dist.Ct.Tr. at 402. He never looked into Bush's psychological history. He never sought Bush's school or prison records. Id. at 319. He never developed evidence of the hardships of Bush's abusive and tragic life growing up in a family of seasonal farmworkers. Id. at 321. He never developed any evidence that might have explained or softened the effect on the jury of Bush's 1974 conviction. Id. at 344. These items were not hidden facts, discoverable only through substantial effort. They were basic background facts and records which the most cursory investigation and preparation would have revealed. And, significantly, Muschott admitted that he did not have a reasonable, tactical reason for not seeking or developing much of this evidence. See, e.g., id. at 319. He simply did not do it.

Bush v. Singletary, 988 F.2d at 1094 (Kravitch, J., dissenting) (footnote omitted) (emphasis supplied).

Under Florida's law, a jury's verdict for death need not be unanimous, but can be made by a simple majority. If a majority does not vote for death, the verdict must be life -- thus, if the jury's vote is six to six, the recommendation is one for life, and the defendant has the right to that verdict. The jury's verdict carries "great weight" and can be overridden only in limited circumstances. Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 2928-29 (1992).

Notwithstanding these standards, the prosecutor repeatedly informed Petitioner's jurors that their verdict for death or life "has to be by a majority of you" and that "[i]t requires seven or more for any advisory sentence" (ROA 45) (emphasis supplied). The judge's instructions then provided the jurors with four comments

about the jury vote, three of which instructed the jury to follow the prosecutor's improper and misleading construction:

- First: "Your decision may be made by a majority of the jury" (ROA 1290).
- Second: "The fact that the determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily..." (ROA 1290).

After these two instructions, the judge's third, inconsistent, comment was: "if by six or more votes the jury determines that John Earl Bush should not be sentenced to death," the life recommendation option could come into play (ROA 1290).

Immediately after this statement, the judge provided the jury with his final instruction. This fourth instruction, the last instruction the jury heard before it retired, told the jury:

You will in just a moment retire to consider your verdict. When seven or more of you are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to this court.

(ROA 1291) (emphasis supplied). "[T]he jury recommended, in a 7-5 advisory sentence, that the death penalty be imposed. The trial judge, citing three aggravating factors and no mitigating factors, sentenced Bush to death." Bush v. State, 461 So. 2d 936, 938 (Fla. 1985).

The convictions and death sentence were affirmed on direct appeal, Bush v. State, 461 So. 2d 936 (Fla. 1985) (Att. E), notwithstanding the Florida Supreme Court's findings that "the only known version of the events" established by the record showed that Mr. Bush "did not realize" what the other participants' plans were;

that he "was under their domination"; that "he intended to set [the decedent] free"; that he did not "desir[e] to kill the victim"; and that he did not kill her. Id. at 937-38.

As to the inaccurate verdict instructions provided to the jury, the Florida Supreme Court noted that "the jury charge contained some objectionable comments..." Bush, 461 So. 2d at 941. Nevertheless, the Florida Supreme Court, like the Court of Appeals in its subsequent ruling, relied on the third comment to deny relief. As in the Court of Appeals' subsequent decision, the Florida Supreme Court provided no analysis to support its conclusion that the instructions were not misleading which accounted for the facts that three of the four instructions provided were inaccurate; that the prosecutor urged the jury to follow the inaccurate construction; or that the final instruction the jury heard from the judge emphasized the inaccurate construction.

Post-conviction relief was thereafter denied by the state courts. Bush v. Wainwright, 505 So. 2d 409 (Fla. 1987); Bush v. Dugger, 579 So. 2d 725 (Fla. 1991). Mr. Bush filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. The District Court conducted an evidentiary hearing limited to the claim of ineffective assistance of counsel at sentencing. Notwithstanding the evidence heard at the hearing, see Att. A, Bush v. Singletary, 988 F.2d at 1093-97 (Kravitch, J., dissenting) (outlining the evidence), the District Court denied relief. Att. H (District Court Order).

The Court of Appeals, by a 2-1 vote, thereafter allowed the death sentence to stand. Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993) (Att. A). That opinion is the subject of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

(I)

THE CONFLICTS BETWEEN THE ELEVENTH CIRCUIT'S RULING AND ENMUND V. FLORIDA, CABANA V. BULLOCK, TISON V. ARIZONA, AND THE EIGHTH AMENDMENT

A. This Court's Standards And Their Application To This Case

John Bush's statements "constitute the only known version of the events," Bush v. State, 461 So. 2d 936, 937 (Fla. 1985), and were "to the effect that he did not realize that his accomplices, Alfonso Cave, 'Pig' Parker and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination." Id. at 937-38. "[A]fter the robbery, they drove toward Indiantown, when his accomplices ordered him to stop. The victim was pushed out of the car and Bush avers that he intended to set her free. However, the accomplices decided that Slater might be able to identify them and they told Bush to dispose of her. Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially." Bush, 461 So. 2d at 938. "[A]n accomplice, Parker, shot her." Id. The medical examiner confirmed that the stab wound was superficial and could not have caused death, and that Ms. Slater died as a result of the gunshot wound (R. 465, 471).

The eighth amendment does not permit "imposition of the death penalty on one ... who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Enmund v. Florida, 458 U.S. 782, 797 (1982). Under Enmund, "[t]he focus must be on [the defendant's] culpability, not on that of [the accomplice] who ... shot the [victim], for we insist on 'individualized consideration as a constitutional requirement in imposing the death penalty...'" Enmund, 458 U.S. at 798, relying on Lockett v. Ohio, 438 U.S. 586, 605 (1978), and Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgement upholding the death penalty....

Enmund, 458 U.S. at 801.

As in Enmund, so too in this case the Florida courts affirmed the death penalty in the absence of record proof that Mr. Bush "killed or attempted to kill, and regardless of whether he intended or contemplated that life would be taken." Enmund, 458 U.S. at 801. Such a finding would have contradicted the very facts cited by the Florida Supreme Court in its recitation concerning what this record disclosed.

In Cabana v. Bullock, 474 U.S. 376 (1986), this Court further explained that the mental state finding required by Enmund must be made by the state courts. Bullock also cautioned that federal

reviewing courts were not to rely on or deem sufficient state court findings that the defendant a) was an active or major participant, and/or b) that there was "sufficient" evidence in the record from which a finding as to the defendant's culpability could be made. Cabana v. Bullock, 474 U.S. at 389-90. Enmund v. Florida, Cabana v. Bullock, and Tison v. Arizona (discussed below) require a finding of fact from the state courts as to the defendant's individual mental state, not a sufficiency determination -- i.e., not, as here, a ruling that participation can be deemed sufficient to constitute the intent required by Enmund.

Thus, the Mississippi Supreme Court's express holdings that "[t]he evidence is overwhelming that [Bullock] was present, aiding and assisting in the assault upon, and slaying of [the decedent]," and that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon [the decedent]," Cabana v. Bullock, 474 U.S. at 389 (emphasis added), quoting Bullock v. State, 391 So. 2d 601, 606, 614 (Miss. 1980), were deemed insufficient to establish the requisite findings of fact on the defendant's mental state because they constituted only a finding of major participation. Such a sufficiency determination that there was evidence from which a finding of intent could be made, i.e., that the defendant's participation and actions constituted intent, was deemed tantamount to a finding that "by legal definition [Bullock] actually killed." Cabana v. Bullock, 474 U.S. at 389-90.

Such a finding does not satisfy Enmund, for Enmund holds that the Eighth Amendment does more than require that a

death-sentenced defendant be legally responsible for a killing as a matter of state law; it requires that he himself actually killed, attempted to kill, or intended that lethal force be used.

Cabana v. Bullock, 474 U.S. at 390.

In Mr. Bush's case, as discussed below, the requisite finding as to his individual mental state was not made by the jury or judge at sentencing, nor by the Florida Supreme Court on direct appeal. The jury heard arguments and instructions on felony murder. The jury convicted and recommended death by a vote of 7-5. No interrogatories as to the jury's findings at trial or sentencing were returned. The sentencing judge and Florida Supreme Court then undertook the same analysis as that of the Mississippi courts in Bullock and of the state courts in Tison (discussed below). The ruling was that because of his participation, Petitioner contributed to the victim's death. Bush v. State, 461 So. 2d 936, 941 (Fla. 1985). Like the Mississippi Supreme Court in Bullock, the Florida Supreme Court made a "sufficiency" determination: that Mr. Bush's "involvement" satisfied "the intent or contemplation required by Enmund." See Bush, 461 So. 2d at 941. But see Bush, 461 So. 2d at 938 ("Bush avers that he intended to set her free. However, the accomplices decided [that she should be killed]. Bush, not desiring to kill the victim, faked a blow at her ... [A]n accomplice, Parker, shot her"). The Florida Supreme Court did not discuss how a finding of fact that Mr. Bush killed, intended to kill, or attempted to kill could be supported on this record. And the Florida Supreme Court made no such finding. Indeed, such a finding would have been at odds with the statement of the facts

related by the Florida Supreme Court itself in the earlier portions of its opinion.

Cabana v. Bullock holds that findings of major or active participation, rulings that because of his participation and actions the defendant contributed to the decedent's death, and/or sufficiency determinations that the defendant's involvement should be equated to intent, do not constitute the finding of fact on the defendant's mental state required by the eighth amendment. There is little difference between the ruling of the Mississippi courts in Bullock and that of the Florida courts here.

In Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676 (1987), this Court reiterated that a finding of major or active participation and contribution to the victim's death does not constitute the requisite finding of individual culpability. Tison, 107 S. Ct. at 1688. Tison held that the state courts must also make a finding of intent or, at a minimum, "reckless indifference to human life" before the death penalty can satisfy the Enmund culpability requirement. Because the state courts had found major participation, see Tison, 107 S. Ct. at 1688, ("The petitioner's own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, 'substantial'"), but not "intent" or "reckless indifference to human life," this Court, relying on Cabana v. Bullock, held:

The Arizona courts have clearly found that the former [major or active participation] exists; we now vacate the judgments below and remand for determination of the latter [intent or reckless indifference to human life] in further proceedings not inconsistent with this opinion.

Tison v. Arizona, 107 S. Ct. at 1688. In Tison, the state courts had found that the defendants were major, active participants whose "own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, 'substantial'." Tison v. Arizona, 107 S. Ct. 1676, 1688 (1987). These findings went beyond those found in Mr. Bush's case. Under the eighth amendment, however, the findings were not enough.

Briefly stated, the Tison brothers gathered a small arsenal of weapons in order to "break" their father and another out of prison. While on the run the four kidnapped a family, then drove them to the desert where the elder Tison shot and killed the family. The Arizona Supreme Court, relying on Enmund, sustained the death sentences, finding:

a) That the Tison brothers "could anticipate the use of lethal force during this attempt to flee confinement." State v. (Rickey) Tison, 690 P.2d 747, 749 (Ariz. 1984);

b) That the Tison brothers abducted the victims, had armed themselves, forced the victims into the car, and escorted the victims to the murder site. They were there when the victim begged "Jesus, don't kill me;" heard the shooter say he was "thinking about it;" and saw the shooter "brutally murder the four captives with repeated blasts from their shotguns." Tison, 107 S.Ct. at 1679; Tison, 690 P.2d at 749;

c) The Tison brothers did not withdraw, did not make "an effort to help the victims," Tison, 107 S.Ct. at 1679, and, "[a]fter the killings, [they] did nothing to disassociate [from the

co-defendant's actions], but instead used the victims' car to continue on the joint venture..." Tison, 690 P.2d at 749; and,

d) The Tison brothers "intended to kill" because their "participation up to the moment of the firing of the fatal shots was substantially the same as [that of the shooter];" they "did nothing to interfere with the murders, and after the murders even continued on the joint venture." Id.

The trial judge found that the Tisons' participation was not relatively minor, that the "participation of each [petitioner] in the crimes" was "very substantial," and that each participant "could reasonably have foreseen that his conduct ... would cause or create a grave risk of ... death." Tison v. Arizona, 107 S. Ct. at 1680. The Arizona Supreme Court also found that "[t]he deaths would not have occurred but for their assistance." State v. (Rickey) Tison, 633 P.2d 335, 354 (Ariz. 1981); Tison v. Arizona, 107 S. Ct. at 1680.

In the present case ... the evidence does demonstrate beyond a reasonable doubt ... that petitioner intended to kill [P]etitioner could anticipate the use of lethal force ... in fact, he later said that during the escape he would have been willing personally to kill in a 'very close life or death situation,' and that he recognized that after the escape there was a possibility of killings.

... Petitioner played an active part in the events that led to the murders ... [relating the facts listed as "a, b, c, and d" above]

... From these facts we conclude that petitioner intended to kill. Petitioner's participation up to the moment of the firing of the fatal shots was substantially the same as that of [the triggerman] Petitioner actively participated in the events leading to death ...

In Enmund, unlike in the present case, the defendant did not actively participate in the events leading to death (by, for example, as in the present case, helping abduct the victims) and was not present at the murder site.

Tison v. Arizona, 107 S. Ct. at 1681 (emphasis added), quoting State v. (Raymond) Tison, 690 P.2d 755, 757-58 (Ariz. 1984). The Arizona Supreme Court thus found "the dictate of Enmund is satisfied." Id.

Unlike the state courts in Tison, the state courts in Mr. Bush's case expressly noted that the "only known version of the events" was that Mr. Bush did not intend to kill the decedent, intended to set her free, and that "not desiring to kill the victim" he faked a superficial blow at her. Bush, 461 So. 2d at 938. The state courts in Mr. Bush's case also expressly found that "an accomplice ... shot her." Id.

But like the state courts in Tison, the state courts in Mr. Bush's case ruled that the requirement of Enmund was satisfied because Mr. Bush was "an active participant in the convenience store robbery" whose participation contributed to the victim's death and who was not a "passive aider and abettor as in Enmund, where the only participation by Enmund was as driver of the getaway car." Bush, 461 So. 2d at 941. Significantly, unlike the state courts in Tison, the state courts in Mr. Bush's case never stated that he intended to kill, nor that he anticipated lethal force would be used, nor that his participation and intent were the same as that of the shooter. Like the state courts had done in Tison, the state courts here relied on Mr. Bush's participation and

involvement in the felonies to support a ruling that Enmund was met. And as in Bullock and Tison, Mr. Bush's involvement was used to supplant a finding of intent; a specific finding of intent or reckless indifference was not made. See e.g., Bush, 461 So. 2d at 941. The sufficiency ruling here, as in Tison, was that "[t]he degree of Bush's participation is sufficient to support a finding that his involvement constituted the intent or contemplation required by Enmund". Bush, 461 So. 2d at 941.

There is no legitimate basis upon which it can be said that the Tisons were entitled to relief but Mr. Bush is not. It is simply not possible to meaningfully distinguish Tison from this case. In Tison, this Court reiterated that "[a]rmed robbery is a serious offense, but one for which the death penalty is clearly excessive" Tison, 107 S.Ct. at 1683. Underlining its Enmund language, this Court wrote that "the focus [has to] be on his culpability, not on that of those who ... shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" Id. Thus the Court in Tison rejected imposition of death upon state court findings which went beyond the ones made in Mr. Bush's case:

Participants in violent felonies like armed robberies can frequently "anticipat[e] that lethal force ... might be used ... in accomplishing the underlying felony." Enmund himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself.

Tison, 107 S.Ct. at 1684. Here, as in Tison, "major participation" and contribution to the death because of that participation is the only thing found. The Florida Supreme Court's analysis in Mr. Bush's case fails under Tison.

After writing that Mr. Bush was "a major, active participant in the convenience store robbery" whose actions contributed to the crime, the Florida Supreme Court added but one other sentence to its determination of the Enmund issue:

The degree of Bush's participation is sufficient to support a finding that his involvement constituted the intent or contemplation required by Enmund.

Bush, 461 So. 2d at 941 (emphasis added). This "sufficiency" determination is certainly not an Enmund finding of fact.

First, as discussed above, this ruling was based on an analysis akin to that of the state courts in Tison -- that participation/involvement in felonies that is not relatively minor, or not as minor as that in Enmund, cf. Bush, 461 So. 2d at 941 ("Here, we do not have" a passive abettor "as in Enmund"), could be substituted for the requisite mental state finding of fact as to individual intent or culpability.

Second, this Court made it clear in Cabana v. Bullock that state court "sufficiency" determinations are not enough to constitute an Enmund finding of fact. Such sufficiency determinations do not meet the Enmund requirement of individualized treatment. There is thus no true Enmund finding in the Florida Supreme Court's sufficiency assertion that Mr. Bush's participation

was "sufficient" "to support a finding" that his "involvement" could constitute "intent" or "contemplation" under Enmund.

In Bullock, this Court held that a finding satisfying the Enmund requirement that a death-sentenced defendant "have actually killed, attempted to kill, or intended that lethal force be used" must be made by the state courts, Bullock, 474 U.S. at 390-91, and expressly held that a sufficiency determination is not such a finding. The Bullock court explained that the Mississippi Supreme Court's rulings that "[t]he evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, [the victim]," and that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon [the victim]," 474 U.S. at 389 (emphasis added), "represent[ed] at most a finding that ... [the defendant] by legal definition actually killed." Bullock, 474 U.S. at 390 (citations omitted) (emphasis in original). See also Tison v. Arizona, 107 S. Ct. at 1688 (applying this analysis).

As did the state court findings in Tison, the Mississippi Supreme Court's findings in Bullock went quite beyond what the Florida Supreme Court wrote in Mr. Bush's case. However, even the Mississippi Supreme Court's language was not enough "to constitute a finding that Bullock killed, attempted to kill, or intended to kill ..." Bullock, 474 U.S. at 389. Simply put, a state-court sufficiency determination is not an Enmund finding of fact. Bullock, 474 U.S. at 389-91. And a state court sufficiency determination such as the one here -- that because of participation

that is not minor intent could be found and Enmund should be deemed to be satisfied -- meets neither Bullock nor Tison. A sufficiency determination, however, is all that the trial judge's comments and Florida Supreme Court's opinion reflect in this case.

The record, the sentencing judge's comments, the Florida Supreme Court's opinion and the Eleventh Circuit's ruling are discussed below.

B. The "Only Known Version of the Events" -- John Bush's Statements

The State introduced four pretrial statements made by Mr. Bush. Three of these statements were made on May 4, 1982, one at 8:40 a.m., one at 7:35 p.m., and one at 9:20 p.m. (ROA 686, 749, 767). The fourth statement was made on May 7, 1982 (ROA 810). As presented at trial, the statements established the following:

On the evening of April 26, 1982, Mr. Bush, who was 19 years old at the time, met with Alfonso Cave, "Pig" Parker, and Terry Wayne Johnson in Fort Pierce, Florida. After a few drinks, they purchased a gallon of gin (ROA 768) and drank it. They also smoked marijuana. They drove toward Stuart, intending to go to Palm Beach (ROA 814). They reached Stuart at approximately 11:00 p.m. and drove out toward Indiantown (ROA 845). There, they stopped at a convenience store. Mr. Bush went in and bought a bag of potato chips. For the next several hours they rode around.

They changed their minds about going to Palm Beach and the group headed back towards Fort Pierce, stopping at the convenience store where Frances Slater worked (ROA 817). Mr. Bush went in to purchase cigarettes. Cave and Parker then got out of the car and

came up behind Mr. Bush as Frances Slater was coming from the back of the store. Cave pulled a gun on her (ROA 819). Cave and Parker told her to open the cash register and the floor safe (ROA 819). After Ms. Slater took the money bag out of the safe, Cave told Mr. Bush to take the bag, to get out and to go to the car. Mr. Bush followed Cave's command. When Mr. Bush got to the car, Cave came out of the store bringing Ms. Slater with him. Cave and Parker put Ms. Slater in the back seat of the car and told Mr. Bush to drive (ROA 819). Mr. Bush did not want to rob the store or kidnap Ms. Slater, but he followed Parker's and Cave's orders. They were armed. He was frightened -- "[h]is statements are to the effect that ... during and after the robbery he was under their domination." Bush, 461 So. 2d at 937-38.

Mr. Bush was told to drive south on U.S. 1. They then told him to head towards Indiantown (ROA 819). When the vehicle got further down the road, Cave and Parker ordered Mr. Bush to stop, (ROA 820); Bush, 461 So. 2d at 938 (they "ordered him to stop"), and Cave and Parker then pushed Ms. Slater out of the car.

Mr. Bush wanted to let her go (ROA 821). "[H]e intended to set her free." Bush, 461 So. 2d at 938. Cave and Parker, however, decided that she might be able to identify them; they told Mr. Bush to "get rid" of her. Parker offered his gun to Mr. Bush; Mr. Bush refused to touch it. Cave gave Mr. Bush his knife (ROA 822), telling him to take it.

Mr. Bush, not wanting to kill Ms. Slater, see Bush, 461 So. 2d at 938 ("not desiring to kill the victim"), and frightened, "faked

a blow at her with the knife and stabbed her superficially." Bush, 461 So. 2d at 938. (The superficial nature of the wound was confirmed by the trial testimony of the medical examiner.) Ms. Slater fell to the ground (ROA 820). Mr. Bush then turned to get back to the car. However, Parker also had gotten out of the car. As Mr. Bush was getting into the car, he heard a gunshot. "An accomplice, Parker, shot her." Bush, 461 So. 2d at 938.

Mr. Bush turned to see Parker standing over Ms. Slater with the gun in his hand. This was the fatal gunshot wound (ROA 837). Mr. Bush, frightened, drove the car away.

As the Florida Supreme Court summarized, his statements, "the only known version of the events," are "to the effect that he did not realize that his accomplices, Alfonso Cave, 'Pig' Parker and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination." Bush, 461 So. 2d at 937-38.

On the following Saturday morning, after the police had seized the car, Mr. Bush went to the Martin County Sheriff's Department. At that point, Detective Lloyd Jones questioned Mr. Bush concerning the Slater homicide investigation (ROA 688). Mr. Bush initially denied involvement. The detectives told Mr. Bush that "only one person pulled the trigger" (ROA 721) indicating that this was something he should think about (ROA 710). "[T]hat's why we're talking to you the way we're talking. We know you ain't the one that pulled no trigger" (ROA 711).

At approximately 3:00 p.m. on that day, Mr. Bush said he would go with Detective Jones to West Palm Beach to "check out" an "alibi". "When it became clear that the alibi witness would not appear, Bush told the officers that they did not have to wait any longer because the witness would not be able to help him." Bush, 461 So. 2d at 938. He acknowledged his participation on the evening of the robbery. During the second statement, Mr. Bush identified Cave, Parker, and Johnson as being with him on that evening. In this statement he described his involvement and explaining that he did not shoot Ms. Slater (ROA 749-757).

After taking this statement, the detectives brought Mr. Bush back to the Sheriff's Department in Stuart, where a third statement was taken from him at 9:20 p.m. (ROA 767-786). He again described his involvement. Mr. Bush also explained that he felt remorse and regret over Ms. Slater's death, saying, "I hate that she's dead, because I have sisters at home" (ROA 778). The morning after the third statement, Mr. Bush was taken before a magistrate for a probable cause hearing. He was formally charged.

On May 7, 1982, the Jail Administrator of the Martin County Jail "received information" that Mr. Bush wanted to talk to Sheriff John Holt (ROA 650). Mr. Bush was taken to the Detective Bureau where a fourth statement was taken. He wanted the officers to know that he did not shoot or want to kill Ms. Slater and, in fact, that he neither killed her nor pulled the trigger (ROA 812). He admitted that he faked stabbing her, but explained that he felt he had no other choice: "The reason I'm here ... to make myself clear

that I didn't shoot her"; he explained that he faked stabbing her "not because I want to, cause I had no other choice"; "[a]nd when I went to the store, it wasn't for to rob or nothin. I went to get a pack of cigarettes. And then that's when everything took place" (ROA 812).

As the Florida Supreme Court would later summarize the evidence: "Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially." Bush, 461 So. 2d at 938. The medical examiner testified that no vital organs were involved in the victim's stab wound, that the wound was superficial and that the cause of death was a gunshot wound.

C. The Rulings of the Sentencing Judge and Florida Supreme Court

The jury, during deliberations, returned a question asking about the application of felony murder "to the verdict form" (ROA 1629). The trial court responded that "no distinction on the verdict form is necessary as both [premeditated murder and felony murder] are murder in the first degree" (Id.). Mr. Bush was convicted (ROA 1640-42). At the penalty phase, by a 7-5 vote, the jury recommended death (ROA 1630), and the court imposed that sentence (ROA 1308). The jurors were told that the death penalty was appropriate in cases of felony murder. The jury returned general verdicts at the guilt-innocence and sentencing phases. The jurors did not return interrogatories.

As the sentencing judge recognized (see, e.g., ROA 1304-05), Mr. Bush's jury was never required to make a finding regarding his individual intent and level of culpability. Florida's statutes and

rules also did not require the judge to make such a finding in order to justify imposition of the death penalty, and the judge said very little about the issue in his sentencing comments. Indeed, the only comments the judge made which touched on the issue came when he discussed a statutory mitigating factor. First, the judge noted that the only evidence heard about the offense (Mr. Bush's statements) showed that Mr. Bush was not the shooter:

Of course, the only version of the actions that took place that night that we have come from your statements both out of court and in court. I guess we don't have to believe your statement, but since there is no other evidence we can't act upon anything that wasn't in evidence. So we must assume that you were an accomplice in the offense and we must assume, that from the evidence of Dr. Wright, that the actual death occurred as a result of the bullet wound and the only evidence, direct evidence that we have is that another person imposed that.

(ROA 1304-05) (emphasis supplied).

Acknowledging that Mr. Bush was culpable under the felony murder rule and that Mr. Bush was an accomplice, the judge stated that Mr. Bush participated in the underlying felonies in a way the judge would not characterize as "minor" under his view of the statutory mitigating factor:

[T]he concept I have of what the legislature meant by relatively minor could fit other circumstances where a participant might be guilty under the felony murder rule, but that participant's actions might have been barely enough to come in under the rule. But here there certainly was activity by you that I cannot characterize as minor, so I do not find [that] mitigating circumstance

(ROA 1306).

Because Mr. Bush was involved in the felonies, the judge declined to find the statutory mitigator. The judge's comments are

strikingly akin to those of the state courts in Cabana v. Bullock, 474 U.S. 376 (1986), and Tison v. Arizona, 481 U.S. 137 (1987). Like the state courts in Tison, the judge stated that Mr. Bush did not withdraw (ROA 1306) in support of his conclusion that Mr. Bush participated in the felonies in a way the judge did not believe he should characterize as "minor" (ROA 1307). Like the state courts in Tison and Bullock, the judge relied on "participation" without making any findings as to Mr. Bush's actual intent.

The judge said: "You took the first step by stabbing her. You said you did not intend to kill her. Apparently the jury disbelieved that and I am privileged to disbelieve it as well" (ROA 1305).² He then said:

In any event, what you did, stabbing her, making her fall to the ground, facilitated and cooperated with Parker in what he did next, and therefore in my opinion there is no way to say that what you did was relatively minor (ROA 1305) (emphasis supplied).³

There is no express finding in these general comments as to Mr. Bush's actual intent, Enmund; Bullock; as to whether he was recklessly indifferent to human life, Tison; or as to whether he ever intended that lethal force would be used against the decedent.

² The jury was instructed on felony murder and accomplice liability theories. There is no evidence that the jury disbelieved Mr. Bush's statements -- those statements, as the Florida Supreme Court would later say and as the judge himself earlier had acknowledged, constitute "the only known version of the events" (ROA 1304). Indeed, the questions posed by the jury (quoted above) indicate that it convicted under the felony murder/accomplice theories.

³ The judge made no mention of the fact that the evidence showed Mr. Bush was frightened and under the "domination" of Parker and Cave. See Bush, 461 So. 2d at 937-38.

Tison; Bullock. To the contrary, the evidence was that Mr. Bush "intended to set her free" when he "faked a blow at her." Bush, 461 So. 2d at 938. But the judge was not required by Florida's statute to make the requisite mental state findings and he did not make them.

On appeal, the Florida Supreme Court noted that "the only known version of the events" was Mr. Bush's statements; that the "statements are to the effect that he did not realize that [Cave, Parker and Johnson] were planning to rob the convenience store"; that "during and after the robbery he was under their domination"; that it was the accomplices who directed him while driving and who then "ordered him to stop"; that Mr. Bush did not intend to kill or harm Ms. Slater but "intended to set her free"; that the other accomplices decided that the decedent should be killed and "told Bush to dispose of her"; that "Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially"; and that "an accomplice, Parker, shot her." Bush, 461 So. 2d at 937-38. The Florida Supreme Court stated subsequently in its opinion that Mr. Bush participated in the "convenience store robbery" and that his actions, i.e., his participation, "contributed to the death of the victim." Bush, 461 So. 2d at 941. Like the state courts in Bullock and Tison, the Florida Supreme Court then made a sufficiency ruling, not a finding of fact, that the "participation" was "sufficient" to conclude that his "involvement constituted" intent or contemplation required by Enmund. Bush, 461 So. 2d at 941. Findings of fact regarding Mr.

Bush's individual mental state which meet eighth amendment requirements were not made by the state courts.

Given its factual recitation, it would have been illogical and contrary to the record and the Court's own construction for the Florida Supreme Court to make a finding of fact that intent or reckless indifference to human life had been established in this case. Indeed, the Court made no such finding, ruling instead that Enmund was satisfied because Mr. Bush was not as minor a participant as was Mr. Enmund, and that the "participation" is "sufficient" to "support a finding that his involvement constituted ... intent." Bush, 461 So. 2d at 941.

The only logical construction is that the Florida Supreme Court meant what it said: that it believed that Mr. Bush's participation or involvement in the felonies could be employed to rule that this case met Enmund and thus that participation or involvement was substituted for a mental state finding. This is not a finding of fact on intent or reckless indifference. And this type of sufficiency determination is the same as the one made by the state courts in Bullock and Tison -- that "by legal definition" intent could be found on the basis of active or major participation in the felonies. Cf. Cabana v. Bullock, 474 U.S. at 390 (A finding that "by legal definition" the defendant's involvement should be deemed to constitute intent does not satisfy Enmund).⁴

⁴ Had the state courts made a finding of fact of intent or reckless indifference, such a finding would not have made sense given the state courts' own findings that "the only known version of the events" were Mr. Bush's statements, that those statements

(continued...)

D. The Eleventh Circuit's Misconstruction of This Court's Standards

As in Tison v. Arizona and Cabana v. Bullock, Mr. Bush's case involves a "sufficiency" ruling -- that there were actions which contributed to the crime, Bush, 461 So. 2d at 936 -- but is devoid of a state court finding of fact that Mr. Bush's intent was an intent to kill or that his mental state was one of reckless indifference to human life. As in Tison and Bullock, the ruling of the state courts in this case is at its essence a ruling that by "legal definition" Mr. Bush should be held responsible. See Bullock, 474 U.S. at 390.⁵

The Eleventh Circuit's post-Bullock cases, however, do not understand the principles established by this Court's precedent. Contrary to this Court's precedent, the Eleventh Circuit has thus consistently relied on state court "sufficiency" rulings to hold that the standards of Cabana v. Bullock, Enmund and Tison are met,

"(...continued)
related that Mr. Bush did not intend to kill the victim but "intended to set her free," that it was the other accomplices who decided to kill the victim, that Mr. Bush "not desiring to kill the victim" faked a blow at her which was superficial, and that "an accomplice, Parker, shot her." Bush, 461 So.2d at 938. Based on the recitation of the facts related by the Florida Supreme Court, the Court could not have found intent or reckless indifference by Mr. Bush in a manner comporting with the record and its own findings concerning what the record reflected. To construe what the state court held as anything other than a sufficiency ruling would be to conclude that the Florida Supreme Court rendered a ruling in contradiction of its own earlier findings.

⁵ See Bullock, 474 U.S. at 389 (finding inadequate the state supreme court's findings that "[t]he evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson" and that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson.")

even in cases where no state court mental state findings ("intent"/ "reckless indifference") exist.

Members of this Court have noted the shortcomings in the review afforded Bullock/Tison/Enmund issues in the Eleventh Circuit and have analyzed the need for certiorari review to resolve the problem. See Smith v. Dugger, ___ U.S. ___, 110 S.Ct. 1511, 1511-13 (1990) (Marshall, Brennan and Blackmun, JJ., dissenting from denial of certiorari) (discussed below). The Eleventh Circuit's approach, said the dissent in Smith, was "a grave departure from our precedents by ... a court with a major role in the administration of this Nation's death penalty law." Id. at 1512. Mr. Bush's case was substantially affected by the shortcomings in the Eleventh Circuit's application of the Tison/Bullock/Enmund standards.

Here, the Eleventh Circuit acknowledged that no jury finding of intent exists. The Eleventh Circuit also declined to rely on the Florida Supreme Court's opinion, conceding that the requisite finding was not made by the state supreme court, although rejecting Petitioner's argument that such a finding would have contradicted "the only known version of the events" which the state supreme court itself found to be disclosed by this record. See Bush v. Singletary, 988 F.2d 1082, 1088 (11th Cir. 1993).

What the Eleventh Circuit did here was to rely on the trial judge's "sufficiency" finding. Bush, 988 F.2d at 1088 ("We hold that the trial judge's finding satisfies the requirement imposed by Enmund and its progeny.") As discussed above, however, the trial

judge's only "finding" in this case, made when rejecting a statutory mitigator, was that Petitioner's "participation" in the crimes was not "minor" and that the statutory mitigator would therefore not be found. Neither was the "participation" of the defendants in Tison or Bullock "minor." Although their "participation" was much more substantial than that of Mr. Bush, in each case this Court found the state courts' findings -- findings strikingly akin to what the judge said here -- insufficient.

Nowhere did the judge (or, for that matter, the jury or Florida Supreme Court) make a finding of fact on Mr. Bush's individual intent; on whether Mr. Bush had a reckless indifference to human life; or on whether Mr. Bush wanted Ms. Slater to be killed. To the contrary, the judge and the Florida Supreme Court noted that the statements, the only evidence in this case, were that "you did not intend to kill her" (ROA 1305, judge's comments); that Mr. Bush did "not desir[e] to kill the victim," Bush, 461 So. 2d 938; and that Mr. Bush "intended to set her free." Id.

What the judge did here was what the state courts did in Bullock and Tison. He said, in essence, that Bush was not as "minor" a participant as was Mr. Enmund. What the Florida Supreme Court did here was also akin to what the state courts did in Bullock and Tison -- it found that because Mr. Bush was not as "minor" a participant as Mr. Enmund, his "participation" could be substituted for a finding of intent. Bush, 461 So. 2d at 941. It relied on a "sufficiency" ruling -- that Bush's "participation is sufficient to support a finding that his involvement constituted

the intent or contemplation required by Enmund," Bush, 461 So. 2d at 941 -- instead of making a finding of fact.

The Eleventh Circuit's misunderstanding of Bullock and Tison is not new. In the past, members of this Court have noted that the shortcomings in the review afforded Bullock/Tison/Enmund issues in the Eleventh Circuit warrants certiorari review. Thus, in Smith v. Dugger, ___ U.S. ___, 110 S.Ct. 1511, 1511-13 (1990), Justices Marshall, Brennan and Blackmun each dissented from the denial of certiorari. As the opinion of Justices Marshall and Brennan explained:

In Enmund v. Florida, 458 U.S. 782, 797, 102 S.Ct. 3368, 3376, 73 L.Ed.2d 1140 (1982), we held that imposing a death sentence on a defendant "who does not himself kill, attempt to kill, or intend that a killing take place" violates the Eighth and Fourteenth Amendments' prohibitions against cruel and unusual punishment. In Cabana v. Bullock, 474 U.S. 376, 390-91, 106 S.Ct. 689, 699-70, 88 L.Ed.2d 704 (1986), the Court reaffirmed and expanded upon Enmund, holding that the federal courts could not make the determination that a defendant met one of the Enmund criteria on their review of state court judgments. Rather, we held that "the State's judicial process leading to the imposition of the death penalty must at some point provide for a finding of that factual predicate." Ibid. In Tison v. Arizona, 481 U.S. 137, 158, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987), this Court held that a showing of both reckless indifference to human life and major participation in a felony would be sufficient to satisfy Enmund. The Court refused to make those findings itself, however, instead remanding to the state courts for a determination whether those factors were present. Ibid.

In this case, the Court of Appeals for the Eleventh Circuit found that Enmund, Cabana, and Tison were satisfied solely on the basis of the Florida Supreme Court's determination that there was sufficient evidence from which the jury could have found that defendant had the intent to kill. In refusing to review the decision below, this Court sanctions a grave departure from our precedents by a panel of a court with a major role in the

administration of this Nation's death penalty law. Accordingly, I dissent.

Respondent does not dispute the basic rule that a State may not sentence to death a defendant "who does not himself kill, attempt to kill, or intend that a killing take place," Enmund, *supra*, 458 U.S., at 797, 102 S.Ct., at 3376, unless that defendant was a major participant in a felony and exhibited reckless indifference to human life, Tison, *supra*, 481 U.S., at 158, 107 S.Ct., at 1688. Nor does respondent suggest that a federal court may make the required finding. Instead, the issue in this case is whether a state court's conclusion that "there was sufficient evidence from which the jury could have found [Smith] guilty of premeditated murder," Smith v. State, 424 So.2d 726, 733 (1983), constitutes the culpability finding required by our cases.

The entirety of the Eleventh Circuit's reasoning on this point is that "[i]mplicit in [the Florida Supreme Court's sufficiency] finding is the conclusion that Smith had the intent to kill." 840 F.2d 787, 793 (1988). Simply asserting a conclusion is hardly sufficient to justify it, especially where, as here, the conclusion is so plainly farfetched. The Florida court's finding that the evidence was sufficient for Smith's jury to find him guilty of premeditated murder is nothing more than a finding that reasonable people could have found that verdict justified; it is emphatically not a finding that this jury did determine that Smith's acts were premeditated. Indeed, the Cabana Court rejected as insufficient a state court's statement far more conclusive than the one here. There, the Mississippi Supreme Court found that "the evidence [was] overwhelming that [defendant] was an active participant in the assault and homicide." Cabana, *supra*, 474 U.S., at 389, 106 S.Ct., at 698. Although this finding was "sufficient to make [the defendant] liable for the murder and deserving of the death penalty in light of Mississippi law," it did not satisfy the Eighth Amendment. *Ibid*.

That the Florida court did not make the required finding is particularly apparent from an examination of its opinion as a whole. In response to an unrelated guilt-phase point of error, the court found that Smith could have been found guilty and sentenced to death on either of two theories, one of which was the felony-murder doctrine. 424 So.2d, at 731. "Under this theory the jury would not have needed to conclude that [Smith] had the requisite intent." *Id.*, at 731-732. The Florida Supreme Court's sufficiency determination thus in no way establishes that Smith's jury found the essential factual

predicate to a death verdict under Enmund, especially in light of the court's acknowledgement that the jury was instructed that it could convict Smith regardless of his intent.⁶

It is tempting to view the Eleventh Circuit's ruling in this case as an unfortunate aberration that should be disregarded as such. Perhaps such a hope has informed this Court's decision to deny certiorari. Nonetheless, the refusal to review the decision below has important consequences. A panel of a Court of Appeals with jurisdiction over the death penalty statutes of three States has equated a state appellate court's finding that there was sufficient evidence from which a jury could have found intent to kill with a finding that the defendant did in fact intend to kill. The panel came to that conclusion notwithstanding that the jury was instructed that it could return a sentence of death even if it did not believe that Smith had the requisite intent. Sufficiency of the evidence claims are routinely made in state death penalty appeals, and state appellate courts invariably will have to make a sufficiency finding in the course of their review. To permit such a finding to satisfy Enmund, Cabana, and Tison is to viscerate their protections. Because I do not think it seemly or sensible for this Court to permit a significant violation of the Eighth Amendment to stand, simply on the hope that it will have no effect beyond the immediate case, I dissent.

Id. at 1511-13 (emphasis in original).

The Eleventh Circuit's approach had an effect beyond the Smith case. Although acknowledging that the jury's verdict did not "answer the culpability question in this case," the Eleventh Circuit Court of Appeals affirmed here, as it did in Smith,

⁶ The footnote stated: "Of course, after Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Florida courts were not required to find that Smith intended to kill in order to satisfy the Eighth Amendment. A finding that he was recklessly indifferent to human life and a major participant in the felony would have satisfied Tison. *Id.*, at 158, 107 S.Ct., at 1688. The Florida courts did not even purport to make the finding required by Tison, however. The only finding in the Florida courts on which respondent relies is the finding that there was sufficient evidence from which the jury could have found Smith guilty of premeditated murder."

although the only thing the state courts found was "major participation," without finding that the Petitioner intended or attempted to kill, wanted the decedent killed or was recklessly indifferent to human life. The Eleventh Circuit affirmed here, as in Smith, although the state courts' ruling, at best, involved no more than a "sufficiency" determination. And the Eleventh Circuit affirmed here solely on the basis of the comments of a state judge who was not required to make Enmund mental state findings; who did not make such findings (the judge never found that Mr. Bush intended or attempted to kill, nor that he was recklessly indifferent to human life); and whose only comments, made when rejecting a statutory mitigating factor relating to minor participation in felonies, were that he would not characterize the Petitioner's "participation" as "minor," not that the Petitioner intended to kill or was recklessly indifferent to human life and not that Mr. Bush's intent was the same as Parker's and Cave's.

E. Conclusion

To effectuate the eighth amendment principles embodied in Enmund, this Court has held that the state courts must expressly find at least that the defendant was a "major participant" and either intended to kill or had a "reckless indifference" to human life. Tison; Bullock. Both participation and mental state findings are needed under Tison and Bullock. All that the judge and Florida Supreme Court found here was the first part of the two-part finding which Tison and Bullock require.

Nowhere did the jury, Florida Supreme Court or trial judge find that Mr. Bush intended to kill, attempted to kill or was recklessly indifferent to human life. There is no express mental state finding from the jury, Florida Supreme Court or trial judge here. Bullock and Tison expressly hold that state court "sufficiency" determinations -- that as a matter of accomplice law the defendant should be held responsible because of his participation -- are insufficient to meet the eighth amendment requirement of express findings of fact as to the defendant's mental state. In Petitioner's case, the state courts' rulings involve no more than such a "sufficiency" determination and the Court of Appeals' ruling is directly in conflict with this Court's precedents.

This departure from the standards of Enmund, Bullock and Tison again comes to this Court from the Eleventh Circuit Court of Appeals -- a court "with a major role in the administration of this Nation's death penalty law." Smith v. Dugger, ___ U.S. ___, 110 S.Ct. 1511, 1512 (1990) (opinion in dissent from denial of certiorari). The ruling in Mr. Bush's case is not "an unfortunate aberration." Id. at 1513. It will affect other cases in that Court.

The Eleventh Circuit's decision is in conflict with this Court's precedents. The Eleventh Circuit's cases demonstrate that that Court's misapplication of Bullock, Tison and Enmund is a recurring problem. That Court's misapplication of Bullock, Tison and Enmund cannot be squared with this Court's law. And that

Court's recurring misapplication of Bullock and Tison has, in practice, overruled those precedents.

If Bullock and Tison are to be overruled, this Court should say so. If not, the conflicts with this Court's precedents engendered by the Eleventh Circuit's decision and the substantial problem arising from the Eleventh Circuit's misconstruction of what Bullock and Tison require warrant the granting of this petition for writ of certiorari.

(II)

THE CONFLICTS BETWEEN THE STANDARD APPLIED BY THE
ELEVENTH CIRCUIT TO PETITIONER'S CLAIM OF JURY
INSTRUCTION ERROR AND THIS COURT'S PRECEDENTS

A. Introduction

While this Court long ago found the death penalty statutes and practices of several states to be facially constitutional, see, e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976), the Court has continued over the years to strike down death sentences when misleading, improper, inadequate or insufficient instructions are provided to capital sentencing juries. See Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990); Caldwell v. Mississippi, 472 U.S. 320 (1985); Godfrey v. Georgia, 446 U.S. 420 (1980); Hitchcock v. Dugger, 481 U.S. 393 (1987); Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926 (1992). In these cases, this Court has sought to assure that instructions not allow unreliable, arbitrary or misleading factors to interfere with

capital juries' sentencing deliberations. Mills; McKoy; Caldwell; Espinosa.

The Florida jury plays a substantial role in capital sentencing. Espinosa, 112 S.Ct. at 2928-29. Because its decision can be ignored only in rare cases, it is treated as "sentencer" for purposes of eighth amendment review. Id. at 2928-29. Error in sentencing instructions provided to capital juries in Florida directly implicate the eighth amendment. Id.

The jury in Petitioner's case, a jury which ultimately returned a 7-5 death vote, was provided misleading and inaccurate instructions as to its role at capital sentencing. Those instructions interjected inappropriate considerations into the jury's deliberations. And it cannot be said "with any degree of confidence" that reasonable jurors would not be misled and misinformed by the instructions in this case. Mills v. Maryland, 486 U.S. 367, 383-84 (1988).

The Eleventh Circuit, however, denied relief without citing, much less so discussing, this Court's precedents in cases such as Mills, McKoy and Caldwell. The Eleventh Circuit rejected Petitioner's claim without mentioning, much less so applying, this Court's precedents mandating a degree of "certainty" and "confidence," Mills, 486 U.S. at 377, 383, before a petitioner's contention that his or her jury was misinstructed about its role at capital sentencing can be rejected. And the Eleventh Circuit rejected Petitioner's contention without acknowledging that, under this Court's precedents, reversal is required when there exists a

"substantial risk that the jury was misinformed as to its role." Caldwell v. Mississippi, 472 U.S. 320, 110 S.Ct. 2633, 2646 (1985); Mills, 488 U.S. at 381.

B. The Inaccurate Instructions To The Jury

Under Florida's capital sentencing scheme, a jury's recommendation that the death penalty be imposed need not be unanimous, but by a simple majority. If a majority does not vote for death, the jury's recommendation is life; thus, if the jury's vote is six to six, the recommendation is one for life, and the defendant has the right to that verdict. During the proceedings resulting in John Bush's death sentence, the prosecutors' comments and judge's instructions deprived him of that right.

During voir dire, the prosecutor informed the jurors of what he believed the law required of them. He repeatedly told them that their recommendation as to life or death "has to be by a majority of you. It requires seven or more for any advisory sentence" (ROA 45) (emphasis supplied). Time and time again, the prosecutor reiterated his theme, telling the jurors that the verdict form on which they would make their recommendation read, "We the jury, a majority of the jury ... advise that the Court impose death or advise the Court impose a life sentence ..." (ROA 222) (emphasis supplied). Finally, in contrasting the jurors' duty to reach a unanimous verdict at guilt-innocence with their function at sentencing, the prosecutor stated:

Now, the first phase is the guilt or innocence phase and that requires a unanimous verdict. All 12 of you must agree. The second phase requires a majority verdict, 7 of you must agree and concur on an advisory sentence.

(ROA 252) (emphasis supplied).⁷

Echoing the prosecutor's contrast between the guilt-innocence and sentencing verdicts, the trial judge's sentencing instructions reiterated the erroneous majority vote requirement. The judge made four comments about the jury's vote in his instructions, three of which repeated the prosecutor's improper construction. The first two were:

- "In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury." (ROA 1290).

- "The fact that the determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily ..." (ROA 1290).

A few moments later, the judge mentioned in one line that "if by six or more votes" the jury voted for life, it may recommend life (ROA 1290). That brief, passing reference to the proper legal standard was rendered virtually irrelevant, however, by the final instruction the judge provided to the jury shortly thereafter. This instruction, the last one the jury received regarding the process they were to employ in arriving at a verdict and the one

⁷ The prosecutor also told the jury that the beyond a reasonable doubt standard was not a factor at the penalty phase (see, e.g., ROA 48-49); urged the jury to allow their sentencing responsibility to be shifted to the judge (ROA 1279-80, 1271, 154-57, 220-23, 251-52, 258, 275, 277, 297); suggested that the death penalty had been legislatively deemed proper in this case (ROA 1270); argued for death on the basis of "sympathy" towards the victim's parents and sister (ROA 1279-81); and argued that the jury should not have sympathy towards Mr. Bush (Id.).

they heard immediately before retiring to deliberate, told the jury:

You will in just a moment retire to consider your recommendation. When seven or more of you are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to this court.

(ROA 1290-91) (emphasis supplied).

The jury returned with a 7 to 5 recommendation for death (ROA 1295). Three of the four instructions they received were inaccurate.

Under the circumstances, the final instruction regarding the jury's vote, particularly when combined with the reinforcement previously received from the judge himself and the prosecutor, would have misled a reasonable juror, giving such a juror the erroneous impression that a majority was needed for life or death. Reasonable jurors hearing the prosecutor's comments, the inconsistent instructions, and then the final instruction, could quite logically believe that a majority vote was needed for a life verdict -- the bulk of what the jury heard directed that a majority was needed to vote for life; the one-line correct statement was overshadowed by the improper instructions and comments; and the first and last instructions the jury heard at sentencing were the improper ones. The instructions were inaccurate, misleading and confusing.

C. The Conflicts With This Court's Precedents Engendered By The Eleventh Circuit's Ruling

The Eleventh Circuit acknowledged that "[p]ortions of both the prosecutor's comments during voir dire and the trial court's

instructions suggest that a vote of seven was required for any recommendation." Bush v. Singletary, 988 F.2d 1082, 1089 (11th Cir. 1993). The Court, however, rejected Mr. Bush's claim because "[o]n one occasion" what the judge said was not inaccurate and because it did not see "evidence to suggest that the jury was confused or divided six to six..." Id. at 1089 (emphasis supplied).

That is not this Court's standard. The Eleventh Circuit's analysis is in direct conflict with this Court's precedents. In Caldwell and Mills, each cited and discussed by Mr. Bush below but neither discussed nor applied by the Eleventh Circuit, this Court held that when what capital jurors are told about their role creates an inaccurate and "misleading picture of the jury's role," eighth amendment error is established and relief is warranted." Caldwell, 105 S.Ct. at 2646. Accordingly, when it is "plausible" that the jury was misled by an inaccurate instruction or when the reviewing court "cannot conclude, with any degree of certainty, that the jury did not adopt [the inaccurate] interpretation of the jury instructions," relief is appropriate. Mills, 486 U.S. at 378.

The Eleventh Circuit did not apply these standards. To the contrary, it imposed on Petitioner the burden of pointing to specific "evidence" about the jury's confusion. Bush, 988 F.2d at 1089. This is not how jury instruction claims are resolved. No case from this Court holds that jury instruction issues can be constitutionally resolved in such a manner. Indeed, since neither this Petitioner nor any other (nor, for that matter, any court) has access to the jury room, no court could impose such a standard.

The Eleventh Circuit's approach not only renders meaningless the standards of Caldwell and Mills, it lacks common sense.

As this Court directly explained in Mills: "There is, of course, no extrinsic evidence of what the jury in this case actually thought." Id. at 381. As in other cases involving jury instruction issues, however, the Court had the judge's instructions: "Our reading of those parts of the record leads us to conclude that there is at least a substantial risk that the jury was misinformed." Id. at 381 (emphasis supplied); see also Caldwell, supra.

As in Mills, 486 U.S. at 381, there is an "additional bit of evidence" in Mr. Bush's case about the inaccuracy of the instructions: the Florida Supreme Court, like the Maryland appellate court in Mills, found that instructions such as those provided here were not proper and promulgated new instructions to correct the problem. Thus the current standard Florida instructions direct judges to inform the jury that a six-to-six vote is a life verdict, without providing any of the misleading and inaccurate instructions given by the judge in Mr. Bush's case. See Fla. Standard Jury Instructions in Criminal Cases, Florida Supreme Court Committee on Standard Jury Instructions in Criminal Cases, "Penalty Proceedings - Capital Cases" (June, 1992, amendments).

The Court of Appeals' imposition of a burden on the Petitioner to point to "evidence" of actual confusion on the part of this jury is directly at odds with this Court's standards:

No one on this Court was a member of the jury that sentenced [the Petitioner], or of any similarly

instructed jury.... We cannot say with any degree of confidence which interpretation [the Petitioner's] jury adopted.

Mills, 486 U.S. at 383. But here, as in Caldwell and Mills, because "[e]volving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case[, the] possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing." Mills, 486 U.S. at 383-84.

The Eleventh Circuit failed to abide by this Court's holdings that in the capital sentencing context, jury instructions that are inaccurate, confusing, contradictory, or misleading are not tolerated because of the eighth amendment's requirement of reliability. See Mills v. Maryland, 486 U.S. at 383-84; McCoy v. North Carolina, 494 U.S. 433 (1990); Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985). This standard applies to instructions concerning the jury's functions. McCoy; Mills; Caldwell. And the inconsistency and inaccuracy here surely "create[d] a misleading picture of the jury's role." Caldwell, 105 S. Ct. at 2646.

Mr. Bush's jury reached a death verdict by the narrowest of margins -- 7-5. The error actually mattered in Mr. Bush's case, and mattered in a way that could have been determinative of the sentence ultimately imposed. The jury was within one vote of a life recommendation. A juror's vote may well have been affected by the instructions -- a reasonable possibility exists, in light of the

instructions provided, that a juror may have changed his or her vote in order to reach a consensus.

Reasonable jurors hearing these instructions, after all, could have believed that a tie verdict was not a real verdict and that a majority had to be reached one way or the other. The instructions were, at best, confusing. The erroneous instructions were not a technical error here -- the vote here shows that the jury was very close and one vote would have made a difference.

The risk that a juror's vote may have changed to death in order for a consensus to be reached, a real possibility under these instructions, is intolerable in a capital case. Such a risk interjects a level of arbitrariness and unreliability not countenanced by the eighth amendment. Such a risk is one which the eighth amendment "dare[s] not risk." Mills, 486 U.S. at 384.

This jury recommended death by the slimmest of margins -- one vote. The incorrect and misleading instructions created the intolerable risk that a death sentence may have been imposed because of the effect of the erroneous instructions. Inconsistently emphasizing to the jury that it had to reach a majority life verdict "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention" from its proper functioning. Beck v. Alabama, 447 U.S. 625, 642 (1980). The instructions may have encouraged the jury to reach a death verdict for an impermissible reason -- its incorrect belief that a majority verdict was required -- and thus "introduce[d] a level of

uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Id. at 643.

The Eleventh Circuit neither applied, nor discussed, nor followed this Court's precedents. To the contrary, that Court has fashioned and applied a standard of review which is supported by no decision from this Court. No case from this Court holds that claims of jury instruction error in capital sentencing can be addressed by the standard articulated by the Court of Appeals.

The Court of Appeals' decision is in conflict with this Court's standards. The standard fashioned by the Court of Appeals, however, is the law of the Eleventh Circuit. The conflicts and substantial questions arising from that Court's law and its application in this case warrant the granting of this petition for writ of certiorari.

(III)

THE CONFLICTS BETWEEN BUSH AND THIS COURT'S PRECEDENT
ADDRESSING QUESTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL
AT CAPITAL SENTENCING

A. Introduction

"To investigate and develop available mitigating evidence" is "a basic and unshakable obligation of defense counsel" in capital cases. Bush v. Singletary, 988 F.2d 1082, 1093 (11th Cir. 1993) (Kravitch, J., dissenting), citing Strickland v. Washington, 466 U.S. 668, 691 (1984), and quoting the Strickland holding that counsel must "make reasonable investigations or ... make a reasonable decision that makes particular investigations unnecessary." "At least" since Lockett v. Ohio, 438 U.S. 586

(1978), the "importance of presenting mitigating evidence has been a prominent feature of the Supreme Court's Eighth Amendment jurisprudence." Bush, 988 F.2d at 1094 (Kravitch, J., dissenting) (citations omitted). As Judge Kravitch also noted, because "[r]easonable investigation ... [is a] prerequisite for constitutional assistance of counsel," "[w]hen counsel breaches the duty of reasonable investigation, even strategic or tactical decisions regarding the sentencing phase, which normally are entitled to great deference, must be held constitutionally deficient." Id. at 1094.

Petitioner's counsel developed no mitigating evidence and presented none. Counsel admitted at the evidentiary hearing that he undertook no efforts which can be deemed "reasonable" investigation or preparation under the law this Court established in Strickland v. Washington. See section B, infra (outlining counsel's hearing testimony). And he admitted that he had no "tactic" or reason for failing to investigate. As a result of his failures, a substantial body of available mitigating evidence, evidence which surely would have made a difference to this 7-5 jury, was not known to counsel and, consequently, not heard by the jury and judge at sentencing. See Bush, 988 F.2d at 1096-97 (Kravitch, J., dissenting) (discussing the evidence and concluding: "nearly half of Bush's jurors were inclined to mercy notwithstanding Muschott's defective performance. Substantial mitigation was available if Muschott had only conducted a basic investigation. There is far more than a mere reasonable

probability that John Earl Bush today faces execution because of constitutionally ineffective assistance of counsel.") The evidence is outlined in detail in Judge Kravitch's dissenting opinion. Bush, 988 F.2d at 1096-97.

B. The Eleventh Circuit's Current Review Of Ineffective Assistance of Counsel Claims, And The Review Afforded In This Case, Are In Conflict With This Court's Precedent

In Strickland v. Washington, 466 U.S. 668 (1984), this Court established the standards applicable to cases such as this one. Those standards, standards at the core of Judge Kravitch's dissent, were ignored by the Eleventh Circuit panel's majority. In Strickland this Court held that "strategic choices made after a thorough investigation of law and facts ... are virtually unchallengeable." Id., 466 U.S. at 690. However, "strategic choices made after less than a complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id.

Under Strickland, if counsel does not "make reasonable investigations" or "make a reasonable decision that makes particular investigations unnecessary," Strickland, 466 U.S. at 691 (emphasis supplied), the Petitioner has established deficiency in counsel's performance. Strickland instructs reviewing courts to consider what the attorney actually did or did not do, why the attorney did or did not do it and whether his or her actions were prejudicial.

Notwithstanding these principles, in a disturbing number of cases the Eleventh Circuit has recently required capital

petitioners to "prove that the approach taken by defense counsel would have been used by no professionally competent counsel...." White v. Singletary, ___ F.2d ___, No. 90-3629 (11th Cir. Sept. 3, 1992), slip op. at 4-5, relying on Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir. 1988) (en banc). The Court has gone so far as to find irrelevant any evidence about counsel's deficiencies which may be disclosed at an evidentiary hearing, so long as it concludes that the petitioner cannot prove that no other professional attorney would have acted in a way akin to that of defense counsel in the case at issue. See Harich, 844 F.2d at 1470. Irrespective of the attorney's level of preparation, or the validity of the decisions made by the attorney, if another attorney could have acted in a way similar to that of the attorney whose conduct is at issue, these Eleventh Circuit decisions hold that relief should not be granted. Harich, 844 F.2d at 1470-71; White, slip op. at 4-5.

In conjunction with this approach, the Eleventh Circuit has also relied on a defense attorney's assertions to deny relief, no matter how untenable the attorney's assertions may be. If the attorney says he had a "strategy," the Court will deny relief irrespective of how uninvestigated, unprofessional or uninformed the strategy may be. The attorney's bald assertion thus often suffices. This too, however, is not what Strickland held -- under Strickland, an attorney has a duty to make a reasonable investigation or a reasonably informed decision that makes a particular investigation unnecessary. Id. at 691.

These troubling recent approaches of the Eleventh Circuit were the foundation of the Eleventh Circuit panel majority's opinion in Petitioner's case. That decision is plainly in conflict with the standards articulated by this Court in Strickland v. Washington, as Judge Kravitch's dissenting opinion thoughtfully articulated.⁸

Noting that defense counsel "Muschott failed to conduct even a minimally adequate search into Bush's background," Bush v. Singletary, 988 F.2d at 1094 (Kravitch, J., dissenting), Judge Kravitch explained:

At the evidentiary hearing in the district court, Muschott conceded that he prepared no mitigating evidence whatsoever to present at sentencing. Dist.Ct.Tr. at 402. He never looked into Bush's psychological history. He never sought Bush's school or prison records. Id. at 319. He never developed evidence of the hardships of Bush's abusive and tragic life growing up in a family of seasonal farmworkers. Id. at 321. He never developed any evidence that might have explained or softened the effect on the jury of Bush's 1974 conviction.⁹ Id. at 344. These items were not hidden facts, discoverable only through substantial effort. They were basic background facts and records which the most cursory investigation and preparation would have revealed. And, significantly, Muschott admitted that he did not have a reasonable, tactical reason for not seeking or developing much of this evidence. See, e.g., id. at 319. He simply did not do it.

Id. at 1094 (emphasis supplied). Judge Kravitch outlined the actual evidence:

Had Muschott conducted a competent investigation he would have discovered information that certainly would have informed, and might very well have altered, his

⁸ Given the substance of Judge Kravitch's opinion and the clarity with which it states the issues, it is incorporated herein.

⁹ The footnote stated: "In fact, Muschott admitted he never even obtained the transcript of, or the Division of Youth Services records about, that case. Dist.Ct.Tr. at 296."

decision not to present any evidence in mitigation. A 1974 report that was included in Bush's incarceration records, for example, stated that Bush had an obsessive-compulsive personality with an incipient pathology, uncertain control of his impulses, and sometimes loosened ties to reality. The reporting doctor worried that Bush was primed for a "possible future psychosis" which might be hastened by "any stress situation."¹⁰ This warning is consistent with the testimony in the district court of Dr. Carbonell, who reported that Bush possesses borderline intellectual functioning and possibly suffers from brain damage and other mental health problems. It suggests that Bush may have suffered from a severe emotional disturbance at the time of the homicide in this case, a statutory mitigating circumstance under Florida law. Fla.Stat. Ann. §921.141(6)(b). Even if Bush's mental health problems did not rise to the level of a severe emotional disturbance, the 1974 report identifies some mental health problems which could have been introduced at the penalty phase as a non-statutory mitigating circumstance. At the very least, the report would have placed Muschott on notice that further investigation into Bush's psychological state was necessary.

Bush, 988 F.2d at 1094-95. She explained that "Muschott had every chance to develop mental health mitigation but neglected to do so."

Id. at 1095. "[T]he state trial court appointed a psychiatrist, Dr. Tingle, and a psychologist, Dr. Sobel, to assist the defense. Yet Muschott met with Dr. Tingle only once, for approximately thirty minutes, no more than ten minutes of which were spent talking about potential mitigating evidence.¹¹ He did not meet with Dr. Sobel at all. He did not have either doctor examine or evaluate Bush. Nor did he provide either doctor with Bush's

¹⁰ The footnote stated: "Bush's subsequent years in prison where, as a teenager, he apparently was raped and assaulted would undoubtedly constitute a 'stress situation.'"

¹¹ The footnote stated: "In an affidavit, Dr. Tingle stated that '[n]o one discussed mitigating circumstances with [him] or asked [him] to conduct an evaluation in that regard.'"

previous psychological reports. Indeed, he could not provide the doctors with Bush's records because his failure to conduct a basic documentary investigation left him ignorant of their existence."

Id. at 1095 (emphasis in original). As Judge Kravitch summarized:

Based solely on his own relatively cursory and wholly untrained observations that Bush had no problems communicating, had demonstrated the ability to weigh options and make his own decision, and was "calm, cool, and collected," Muschott abandoned a potentially life-saving sentencing strategy.

Id. Judge Kravitch then discussed the majority's opinion, and its inconsistency with Strickland:

The majority holds that "[g]iven what Muschott could readily observe about Bush, what Muschott knew of Bush's background and the advice of Dr. Tingle, Muschott acted within the wide range of reasonable professional judgment." Ante at 1092. "[W]hat Muschott knew," however, was crucially limited by his failure to conduct a reasonable documentary investigation. Had Muschott obtained Bush's easily obtainable incarceration records, as he should have, he would have been aware of Bush's earlier psychological reports and surely would have realized the importance of Bush's court-appointed doctors examining him and reviewing his records. Furthermore, Muschott must have known that nothing could be determined reliably about Bush's mental health status without psychological testing and that a mental health strategy should not be abandoned until Dr. Sobel performed those tests. See Dist.Ct. Exh. 8, attach. 5 (Dr. Tingle's notes); Exh. 14(d) (Muschott's notes). Dr. Sobel was available to test Bush. Muschott simply declined to have her do the tests.

Id. at 1095. Dr. Tingle's notes from the time of the trial proceedings and affidavit (Exh. 8) stated that no one asked him to evaluate mental health-related mitigating circumstances; that neither he nor Dr. Sobel were ever asked to see and evaluate Mr. Bush; and that no one discussed mitigating circumstances with him. Defense counsel's notes from the time of the trial proceedings

(Exh. 14(d)) stated that after his meeting with Dr. Tingle, he concluded that the judge should order that Mr. Bush be "order[ed] ... up here ... for testing" and that records regarding "Bush's past history of psychiatric disorder" should be obtained. The arrangements were never made. Although the doctors were available and counsel's own notes related the need for an examination, counsel never arranged for them to see Mr. Bush.

And although evidence (from family, employers, ministers, teachers, and others) was available which would have established substantial mitigation, counsel did virtually nothing to investigate it. As he acknowledged at the hearing, he had no tactic for his failure to investigate.

Judge Kravitch discussed the failures apparent in counsel's abdicating of the duty to reasonably investigate evidence about Mr. Bush's background:

Muschott likewise was inexcusably unaware of information that would have explained or softened the impact of Bush's 1974 conviction and thirty-year sentence for rape and robbery. This failure tainted two important defense strategy decisions. First, Muschott decided not to attempt to mitigate the effect on the jury of evidence presented by the State that Bush had been convicted of rape and robbery and sentenced to thirty years' imprisonment.^[12] Even more significant, Muschott chose not to present any evidence of Bush's difficult family background or positive character traits.^[13] He made

¹² The footnote stated: "Under Florida law, prior conviction of a violent crime is a statutory aggravating circumstance. See Fla. Stat. Ann. § 921.141(5)(b)." -

¹³ The footnote stated: "Several witnesses would have testified, for example, that Bush is a loving and devoted father to his daughter, who has Down's Syndrome, and that he once saved the life of a young child who was drowning. See, e.g., Affidavits of Debora Mitchell, Denise Bush & Janie Nicholson."

these decisions because he feared that the State, in rebuttal, would reveal the details of the 1974 crime. Because of his complete failure to investigate, however, Muschott did not know that Florida officials, whose opinion likely would have carried great weight with the jury, were on record as stating that Bush's conduct had been far from the cold act of a heinous criminal. Bush's 1974 presentence investigation report found that he "does not impress one as being a hard nosed street kid. Instead he impresses one as being a youth who has inadvertently involved himself in a very serious adult crime." The report concluded that Bush should suffer the minimum amount of retribution allowable by the Court. Bush's sentencing judge went further. He stated that he did not believe that Bush's conduct warranted even the minimum sentence imposed by Florida law, though of course he could not sentence Bush to less than the statutory minimum. If Muschott had been aware of this information, he might very well have chosen to introduce humanizing evidence of Bush's family background and character traits, knowing that if the State attempted to countermand that evidence with the 1974 crime, he could surrebut with the statements of the Florida officials.

Id. at 1095-96.

Judge Kravitch summarized what the record disclosed about Muschott's actual preparation:

In sum, Muschott's investigative effort in preparing for the penalty phase of Bush's trial amounted to one short conversation with Dr. Tingle based solely on Muschott's own inconsiderable and untrained observations and a few conversations with Bush's father, brother, and girlfriend, most of which were initiated by them. In my view, Muschott failed to discharge his duty of reasonable investigation. Consequently, his strategy at sentencing -- doing nothing more than asking the jury to listen to the one of Bush's four statements in which he sounded most remorseful -- was constitutionally tainted.

Id. at 1096.

Then, directly addressing the shortcomings in the majority's approach, Judge Kravitch wrote:

Muschott also failed to render constitutionally adequate assistance of counsel when he chose not to introduce mitigating evidence that could not reasonably have opened the door to damaging evidence in rebuttal.

Muschott feared that if he introduced mitigating evidence, including Bush's sympathetic background and intellectual and mental health deficiencies, the State would introduce statements by Bush's codefendants that his involvement in the murder had been extensive, as well as details of the 1974 crime. Much of the mitigating evidence that might have persuaded the jury to vote for life, however, was completely distinct from this potential rebuttal evidence. That Bush is the loving father of a daughter with Down's Syndrome or once saved a drowning child, for example, has nothing to do with the details of the 1974 crime or the extent to which Bush participated in the murder, and cannot reasonable have given rise to the fear of rebuttal. The same goes for Bush's mental health problems and for the hardships Bush endured as an abused child in a family of seasonal workers, with a disabled and alcoholic father and a mother who died when he was just a boy.^[14]

Id. at 1096 (emphasis in original). Applying this Court's standards, Judge Kravitch noted:

I agree with the majority that Muschott acted reasonably when he asked the jury to listen to the statement in which Bush sounded most remorseful. The Sixth Amendment problem in this case is not with what Muschott did but what he did not do. He did not conduct a constitutionally adequate investigation into Bush's background and he did not introduce significant evidence that could not reasonably have given rise to damaging rebuttal. That counsel made many competent decision does not preclude a finding of ineffective assistance of counsel. The right to effective assistance of counsel may be violated "by even an isolated error of counsel if that error is sufficiently egregious and prejudicial."^[15] Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986); accord Strickland, 466 U.S. at 693-96, 104 S.Ct. at 1067-69;

¹⁴ The footnote stated: "In addition, the judge had ruled that Bush's inability to cross-examine the codefendants at sentencing rendered their statements about the extent of Bush's participation in the crime inadmissible. See Sentencing Hearing Tr. at 48-49."

¹⁵ The footnote stated: "For the same reason, the fact that Bush took the stand at the sentencing phase is not determinative of the Sixth Amendment issue in this case. That Bush himself made a tactical error when he insisted on testifying does not render Muschott's independent failure to prepare for sentencing any more constitutionally palatable."

United States v. Cronin, 466 U.S. 648, 657 n.20, 104 S.Ct. 2039, 2046 n.20, 80 L.Ed.2d 657 (1984). Muschott's abdication of his responsibility to investigate and present mitigating evidence was a significant error, in my view, more than sufficiently egregious to implicate Bush's right to constitutionally effective counsel. The range of professional judgment acceptable under the Sixth Amendment is wide, but not boundless.

Id. at 1096 (some emphasis supplied).

As to prejudice, the majority opinion provided no more than a two-sentence, unsupported assertion that there was no prejudice. Bush, 988 F.2d at 1093 (majority opinion). Judge Kravitch's opinion analyzed why that two-sentence holding fails under Strickland:

The majority also errs in holding that Bush does not satisfy the prejudice prong of Strickland. Contrary to the majority's summary conclusion, a reasonable likelihood does exist that but for Muschott's constitutionally deficient performance Bush's jury would have rejected the death penalty. All that is necessary to satisfy the prejudice prong in this case is a reasonable probability that one additional juror would have voted for life. A reasonable probability is simply a likelihood sufficient to undermine confidence in the jury's death recommendation, not even proof by a preponderance of the evidence. Strickland, 466 U.S. at 693, 104 S.Ct. at 2068. Notwithstanding Muschott's constitutionally inadequate performance, the State could muster only seven votes for death. Under Florida law a six-six split constitutes a recommendation against the death penalty. ... The sentencing judge can override such a recommendation only if the facts suggesting a death sentence are so clear and convincing that virtually no reasonable person can conclude that life imprisonment is an appropriate sentence. ... That standard could not have been met in this case.

Id. at 1096-97 (citations to cases other than Strickland omitted).

Discussing the substantial nature of the evidence Muschott failed to consider, investigate or present, Judge Kravitch wrote:

Abundant mitigating evidence was available to humanize Bush in the eyes of the jury, including his loving devotion to his child suffering from Down's Syndrome and his borderline intellectual functioning (if not more serious mental health problems). If only some of that evidence had been introduced, the State would not have been able to emphasize to the jury, as it did, that "[t]here has been no testimony concerning the character of the defendant other than the fact that he was previously convicted of a serious crime." Sentencing Hearing Tr. at 155. Because no mitigating evidence whatsoever was introduced, the jury was left with only the prosecution's view: that John Earl Bush possessed no positive human qualities worth sparing.

Id. at 1097. And Judge Kravitch concluded: "nearly half of Bush's jurors were inclined to mercy notwithstanding Muschott's defective performance. Substantial mitigation was available if Muschott had only conducted a basic investigation. There is far more than a mere reasonable probability that John Earl Bush today faces execution because of constitutionally ineffective assistance of counsel." Bush, 988 F.2d at 1097 (Kravitch, J., dissenting).

Given the nature of Florida's sentencing scheme -- that a jury recommendation of life without a "reasonable basis" in the record such as mitigating evidence supporting it may be overridden, Stevens v. State, 552 So. 2d 1082, 1085 (Fla. 1989) -- and given counsel's own testimony that there was a "consensus" and "substantial likelihood" that the death penalty "would be imposed [by the judge] regardless of the jury's recommendation" (Dist.Ct. Tr. 363) (emphasis added), counsel's failure to develop and present any mitigation cannot be deemed adequate attorney performance under this Court's law. Counsel, however, testified at the hearing that the course he followed, without adequately investigating in the first instance, was to present no mitigation to support a verdict

of life and he, in fact, developed and presented no mitigating evidence. With such a "substantial likelihood" that death would be imposed by the judge regardless of the jury's verdict, it was especially important for counsel to develop and present mitigation in order to establish a "reasonable basis" for a life recommendation. See Stevens, 552 So. 2d at 1086-87.

Counsel's failure to develop mitigating evidence here was unreasonable under any view of Strickland because it was a decision that made a sentence of death more likely, whether or not the jury recommended life; because of the facts elicited from him and the prosecutor at the hearing demonstrating that there was no true rebuttal for most of the mitigating evidence which could have been presented, see Bush, supra (Kravitch, J., dissenting);¹⁶ and because counsel's decision was made without the benefit of a reasonable and informed investigation and development of available mitigating evidence. See Bush, 988 F.2d at 1093-97 (dissenting opinion of Judge Kravitch).

¹⁶ The trial prosecutor testified at the District Court hearing that he presented all the evidence he had available against Mr. Bush (E.g., Dist.Ct.Tr. 250). When asked about what evidence he and Muschott believed could have been introduced to rebut the mitigation outlined above, the prosecutor stated that there was no rebuttal evidence in his possession to undermine that testimony (Tr. 248) and that "we didn't have any evidence to rebut that" (Tr. 271-72). Muschott himself acknowledged that he did not know what theory the prosecution could have used to rebut evidence of statutory mitigating circumstances in this case (Dist.Ct.Tr. 412), and could not explain what rebuttal he believed the state could have introduced to rebut additional nonstatutory mitigation.

C. Conclusion

This case involves an attorney who knew the trial judge was inclined to impose death irrespective of the jury's decision, but who nevertheless undertook little effort to develop evidence in mitigation and then presented none. Given the evidence and the jury's 7-5 vote, any effort by counsel to present mitigating evidence could have resulted in a life recommendation from the jury. Moreover, evidence such as that involved in this case would have established a "reasonable basis" for life as a matter of Florida law, thus protecting the jury's verdict against a judicial override.

Without any presentation by counsel, however, the prosecutor was allowed to argue for death to the jury and judge because: "There has been no testimony concerning the character of the defendant other than the fact he was previously convicted of a serious crime" (ROA 1279). As Judge Kravitch explained, even taking into consideration any evidence or argument the state might conceivably have produced in rebuttal, Mr. Bush established deficient performance and prejudice under Strickland. Bush v. Singletary, supra (Kravitch, J., dissenting) (Att. A).

The standards of Strickland, as Judge Kravitch's dissent demonstrates, cannot be squared with the panel majority's decision. The Eleventh Circuit's decision here is not an isolated misapplication of Strickland. See White; Harich (discussed above). The conflicts with this Court's precedent embodied in the Bush majority opinion will continue to affect cases in the Eleventh

Circuit. The conflicts and the substantial questions involved warrant this Court's review.

If the law is to be altered to hold that any "tactic" asserted by counsel, no matter how poorly informed or how inadequate the investigation, will insulate that lawyer against a claim of ineffective assistance of counsel, Petitioner respectfully submits that it is this Court which should so hold. Even under such a standard, Petitioner's case remains a compelling one, for it is difficult to conceive of any attorney who would choose to put on nothing in mitigation (and thus to present no "reasonable basis for life") when he knows in advance that the judge is inclined to impose death regardless of the jury's decision. That is what counsel "chose" to do here. And he made that "choice" on the basis of an "investigation" that was far from adequate or reasonable. See Bush, 988 F.2d at 1093-97 (Kravitch, J., dissenting) (Att. A).

The Eleventh Circuit majority opinion is at odds with the law of Strickland. The standard embodied in that opinion will affect future cases in the Eleventh Circuit presenting claims of ineffective assistance of counsel at capital sentencing. This case warrants the granting of this petition for writ of certiorari in order for the conflicts to be resolved and in order for this Court to inform practitioners and subsequent panels of the Eleventh Circuit of the standards under which they should operate when evaluating claims of ineffective assistance of counsel at capital sentencing.

CONCLUSION

Based on the foregoing Petitioner prays that the Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Celia A. Terenzio, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 18th day of October, 1993.

Julie D. Naylor
Attorney

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 93-6431

Supreme Court, U.S.
FILED

OCT 18 1993

OFFICE OF THE CLERK

JOHN EARL BUSH,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

- A - Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993).
- B - Petition for Rehearing and Suggestion for Rehearing En Banc, Bush v. Singletary -- excerpts (discussion of issues from petition).
- C - Bush v. Singletary, Order of the Court of Appeals denying rehearing and en banc review (July 20, 1993).
- D - Bush v. Singletary, Order of the Court of Appeals staying mandate pending certiorari review (August 9, 1993).
- E - Bush v. State, 461 So. 2d 936 (Fla. 1985).
- F - Bush v. Wainwright, 505 So. 2d 409 (Fla. 1987).
- G - Bush v. Dugger, 579 So. 2d 725 (Fla. 1991).
- H - Bush v. Dugger, Order of the United States District Court for the Middle District of Florida.

dict the legal consequences of their actions" and to "facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts." *Moragne*, 398 U.S. at 403, 90 S.Ct. at 1789.

In *Admiral's Cove*, an Eleventh Circuit panel held that when an easement falls within the meaning of section 621(a)(2), the property owner cannot deny access to that easement. 835 F.2d at 1362. *Thos. J. White* reaffirmed this holding. 902 F.2d at 908-09. Since both holdings addressed private easements, the panel was bound to follow them. Because it did not, we now have two rules of law in this circuit concerning the proper construction of section 621(a)(2). To potential litigants (and to me) this circuit's interpretation of section 621(a)(2) is confused.

IV.

As I have discussed, there were three reasons why the panel should not have applied the canon of statutory construction to avoid an unconstitutional construction of the Cable Act. First, the panel was bound by Supreme Court precedent that clearly establishes that statutes are not unconstitutional because they do not explicitly provide for just compensation; yet the panel, misunderstanding dictates of the Court's jurisprudence, sought to avoid an illusory unconstitutional construction. Second, the panel was bound by *Thos. J. White's* and *Admiral's Cove's* holdings; yet the panel failed to adhere to them. Third, to construe the Cable Act, the panel was not required to avoid its just compensation issue because that issue arose solely from the district court's fashioning of equitable relief; yet the panel found that the takings issue controlled its statutory interpretation. As I expressed in the opening paragraphs of this opinion, the first two reasons each warrant en banc review. The third reason demonstrates how the panel, contrary to the very rule of construction it sought to apply, took an unnecessary excursion into takings jurisprudence.

For these reasons, I respectfully dissent from the court's decision not to rehear this case en banc.

HATCHETT, Circuit Judge, dissenting.
I dissent from the decision to deny rehearing en banc.

ANDERSON, Circuit Judge with whom KRAVITCH, Circuit Judge, joins, dissenting:

Respectfully, I dissent from the decision not to rehear this case en banc.



John Earl BUSH, Petitioner-Appellant.

v.

Harry K. SINGLETARY, Secretary,
Florida Department of Corrections,
Respondent-Appellee.

No. 89-4051.

United States Court of Appeals,
Eleventh Circuit.

March 30, 1993.

Following affirmance of first-degree murder conviction and death sentence, 401 So.2d 936, petition for writ of habeas corpus was filed in state court. The Florida Supreme Court, 579 So.2d 725, denied petition and petition for writ of habeas corpus was filed in federal court. The United States District Court for the Middle District of Florida, No. 88-00022-Civ-FTM-13A, George C. Carr, J., denied petition and petitioner appealed. The Court of Appeals held that: (1) sentence of death was not cruel and unusual punishment; (2) prosecutor's presentation was not misleading; and (3) defense counsel was not ineffective at sentencing phase.

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11. Criminal Law §641.13(6)

Counsel must investigate defendant's background before sentencing in capital murder case.

12. Criminal Law §641.13(6)

Adequacy of scope of attorney's investigation into defendant's background before sentencing in capital murder case is to be judged by standard of reasonableness, and after adequate investigation, counsel may reasonably decide not to present mitigating character evidence at sentencing.

13. Criminal Law §641.13(7)

Defense counsel's failure to present evidence during sentencing phase of capital murder trial as to defendant's background was reasonable; both defendant's father and brother indicated they did not want to testify and no other family member came forward despite counsel's willingness to talk with them. U.S.C.A. Const.Amend. 6.

14. Criminal Law §641.13(6, 7)

Defense counsel acted within wide range of reasonable professional judgment when he chose not to investigate capital murder defendant's psychological history more thoroughly, not have defendant examined by psychiatrist or psychologist, and not to present mitigating psychological evidence at sentencing hearing given what defense counsel could readily observe about defendant, what he knew of defendant's background, and advice of psychiatrist. U.S.C.A. Const.Amend. 6.

15. Criminal Law §641.13(7)

Defense counsel's failure during sentencing phase of capital murder case to present evidence that defendant did not kill or intend to kill victim was reasonable; there was no evidence that defendant was physically or psychologically coerced into participating in underlying felony or in murder. U.S.C.A. Const.Amend. 6.

16. Criminal Law §641.13(6, 7)

Defense counsel's failure to investigate and present evidence during sentencing phase of capital murder case as to defendant's intoxication at time of offense was reasonable; defendant admitted that he drank less than other participants in

crime and officer who stopped defendant and codefendants on night of murder testified that defendant was calm and collected. U.S.C.A. Const.Amend. 6.

Billy H. Nolas, Julie D. Naylor, Ocala, FL, for petitioner-appellant.

Celia A. Terenzio, Asst. Atty. Gen., Dept. of Legal Affairs, West Palm Beach, FL, for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH, EDMONDSON, and COX, Circuit Judges.

PER CURIAM:

John Earl Bush, a Florida inmate, was convicted of first-degree murder and sentenced to death. He filed a 28 U.S.C. § 2254 petition challenging both his conviction and his sentence. The district court denied relief, and Bush appeals. We affirm.

FACTS

On April 27, 1982, John Earl Bush and three other men abducted Frances Slater from the convenience store where she worked. Her body was found later that day, thirteen miles away. She had been stabbed in the abdomen and shot once in the back of her head at close range. The convenience store's cash register and floor safe had been robbed of approximately \$134.00. Bush was tried for the crimes in 1982 and convicted, following a jury trial, of first degree murder, armed robbery and kidnapping.

Four pretrial taped statements made by Bush to law enforcement authorities were introduced at trial. The Supreme Court of Florida described these statements as "the only known version of the events [which] are presented by Bush in the light most favorable to him." *Bush v. State*, 461 So.2d 936, 937 (Fla.1984). In the first statement, Bush denied any involvement with the Slater abduction but said that on the night in question he had given a ride to

ing on the adequacy of counsel issues, the district court denied relief on all claims.

The district court issued a certificate of probable cause to appeal, and we subsequently held proceedings in this court in abeyance to allow Bush to pursue state habeas proceedings in the Florida Supreme Court. The Supreme Court of Florida, however, denied relief. *Bush v. Dugger*, 579 So.2d 725 (Fla.1991).

ISSUES ON APPEAL

Bush argues on this appeal that the district court erred in denying relief on four claims. His brief articulates the issues as following:

(1) Whether Mr. Bush's sentence of death constitutes cruel and unusual punishment because the state courts did not make a finding on his individual culpability sufficient to satisfy the Eighth Amendment.

(2) Whether the prosecutor's inaccurate, inconsistent, and misleading presentation violated the Eighth and Fourteenth Amendments.

(3) Whether the state's comments and the trial court's instructions that a verdict [recommending] life imprisonment

the Florida Supreme Court refused to review certain of his claims the court found procedurally barred.

Claim 8: The petitioner was denied his right to an individualized and fundamentally fair and reliable capital sentencing determination because the State intentionally relied upon victim impact, comparable worth, and other improper factors in its efforts to obtain a sentence of death.

Claim 9: The petitioner was deprived of Eighth and Fourteenth Amendment rights by prosecutorial comments and judicial instructions which diminished the jurors' sense of responsibility during the sentencing phase of his trial.

Claim 10: Petitioner's statements to law enforcement personnel were obtained in violation of *Miranda v. Arizona* and the Fifth, Sixth, Eighth, and Fourteenth Amendments. Claim 11: The petitioner was deprived of Eighth and Fourteenth Amendment rights by judicial instruction which may have misled the jury into thinking that it had to reach a majority recommendation regarding sentencing.

Claim 12: The prosecution's violation of state discovery rules violated petitioner's due process rights, his right to a fair trial, and his

had to be rendered by a majority of the jury misled the jury as to its role at sentencing and created the risk that death may have been imposed because of inappropriate factors, in violation of the Eighth and Fourteenth Amendments.

(4) Whether Mr. Bush received ineffective assistance of counsel at the sentencing phase of his capital trial.

Brief for Appellant at 1.

We will address each issue in turn.

DISCUSSION

1. Whether Bush's sentence of death constitutes cruel and unusual punishment because the state courts did not make a finding of his individual culpability sufficient to satisfy the Eighth Amendment.

[1] Bush argues that the death sentence is unwarranted in this case because the state courts did not make a finding that he was responsible for the murder of Ms. Slater. Principles of proportionality embodied in the Eighth Amendment prohibit the imposition of the death penalty upon persons who, though guilty of capital murder,

right to confront and cross-examine witnesses against him, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Claim 13: The petitioner was deprived of his rights under the Sixth, Eighth, and Fourteenth Amendments by the prosecutor's use of hypnotically induced testimony at trial.

Claim 14: Petitioner's Eighth Amendment rights to a reliable sentencing determination were violated by the improper introduction of inflammatory and prejudicial photographs at his capital trial.

Claim 15: Bush was deprived of his Sixth Amendment rights by the prosecutor's introduction into evidence the results of a post-arraignment line-up conducted before Bush had been appointed counsel, and his appellate counsel was ineffective in not raising this issue on appeal.

Claim 16: The petitioner's Eighth Amendment rights were violated by the sentencing court's refusal to find the mitigating circumstances clearly set out in the record.

Claim 17: Bush was deprived of rights under the Fifth, Sixth, Eighth and Fourteenth Amendments by prosecutorial and judicial "burden shifting" during the sentencing phase of his trial.

cient to support a finding that his involvement constituted the intent or contemplation required by *Enmund*.

461 So.2d at 941.

We hold that the trial judge's finding satisfies the requirement imposed by *Enmund* and its progeny.

Bush's argument that the Florida Supreme Court's statement that Bush's statements "constitute the only known version of the events" would contradict a finding that Bush intended to kill the victim is meritless. The Supreme Court simply summarized Bush's fourth statement as presented by Bush "in the light most favorable to him." *Id.* at 937. The suggestion that the Florida Supreme Court was finding as a fact that Bush's fourth statement represented the truth about the events in question and that the court's description of Bush's statements, therefore, constituted a finding by that court that Bush did not have the requisite intent is untenable.

2. Whether the prosecutor's inaccurate, inconsistent, and misleading presentation violated the petitioner's rights under the Eighth and Fourteenth Amendments.

[4] Bush contends that the prosecutor asserted that Bush was the triggerman and ringleader; that the same prosecutor asserted in Parker's trial that Parker was the triggerman and ringleader; and that the same prosecutor asserted in Cave's trial that Cave was the triggerman and ringleader. Moreover, Bush contends the prosecutor presented misleading evidence during Bush's trial to support the theory that Bush was the triggerman, even though the prosecutor knew that theory was false. This inaccurate, misleading, and inconsistent presentation, Bush contends, was fundamentally unfair, violated due process, and rendered unreliable the death sentence imposed.

The State responds that Bush focuses on an isolated comment by the prosecutor; that the State did not present any evidence or argument to suggest that Bush was the triggerman but, on the contrary, relied on the felony-murder theory to convict Bush.

The State denies presenting any misleading evidence.

The Supreme Court has said that improper argument by a state prosecutor can make a trial so fundamentally unfair as to deny a defendant due process. *Donnelly v. De Christoforo*, 416 U.S. 637, 646, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974). In this instance, however, the arguments made by the prosecution did not deprive Bush of his due process rights.

The State's evidence at trial and the prosecutor's arguments were predicated on two theories of first degree murder: felony murder and aiding and abetting premeditated murder. One statement by the prosecutor suggested that Bush was the triggerman, but this isolated suggestion was inconsistent with the prosecutor's overall presentation and argument. The prosecutor correctly told the jury that the State did not have to prove that Bush touched or stabbed the victim to sustain a first degree murder conviction. R.6 at 988-89, Trial Transcript. It is absolutely clear, therefore, as the district court found, that this single comment by the prosecutor could not have affected the judgment of the jury.

The evidence presented by the State that Bush argues was misleading relates to the caliber of the murder weapon. Bush argues that the evidence regarding the bullet found in the victim's body is not consistent with the evidence regarding the caliber of Bush's gun. He contends that an unfired, .38 caliber round was found in his car, but that the fragment found in the victim's body was part of a .32 caliber bullet. Bush argues that the State presented the theory connecting the unfired round found in Bush's car to the bullet found in the victim's body while knowing it to be inaccurate.

The petitioner must prove that misleading evidence was presented and that it was material in obtaining his conviction. *Donnelly*, 416 U.S. at 647, 94 S.Ct. at 1873. *Tejada v. Dugger*, 941 F.2d 1551, 1556 (11th Cir.1991), cert. denied, — U.S. —, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992).

A ballistics expert at trial testified that the bullet that killed the victim could have

(b) counsel failed to investigate and present evidence of Bush's intellectual and psychological impairments,

(c) counsel failed to investigate and present evidence to show that Bush did not kill or intend to kill,

(d) counsel failed to investigate and present evidence to show that Bush's participation in the crime was the result of physical and psychological coercion, and

(e) counsel failed to investigate and present evidence to show that Bush was intoxicated at the time of the offense.

District Court Opinion at 32.

[9, 10] To prove that counsel was constitutionally ineffective, the petitioner must demonstrate that counsel's performance was deficient and that the deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. In evaluating petitioner's claims on the deficiency issue, we will consider whether counsel acted outside the wide range of reasonable professional judgment. *Id.* at 690, 104 S.Ct. at 2066. On the prejudice issue, the petitioner must show that, but for counsel's unprofessional errors, there is a reasonable probability that the sentencer would have weighed the balance of aggravating and mitigating factors to find that the circumstances did not warrant the death penalty. *Id.* at 694, 104 S.Ct. at 2068. First, we address the allegations of counsel's deficiency. We then address the prejudice issue by considering the evidence Bush claims should have been introduced and the likely impact of that evidence on the sentencers' determinations.

A. Deficiency

The district court held an evidentiary hearing on the issue of effectiveness of counsel and made extensive findings of fact regarding Muschott's strategy. The district court described Muschott's dilemmas and his strategy to overcome them as follows:

Faced with Bush's prior admissions, and with Muschott's own conclusions [that Bush was very aggressive and cold and appeared unremorseful and] that Bush was competent and that he had

assumed a leadership role in the Slater murder as well as in the 1974 rape of the nineteen year old, Muschott decided that his best defense (and his best chance of avoiding the death penalty for his client) was to argue that Mr. Bush never had any intention of killing Frances Slater, that he wanted no part in her death and that, in fact, he had schemed against his codefendants to spare her life.

District Court Opinion at 14 (citations omitted). There was evidence supporting this theory. In Bush's fourth taped statement, he confessed to stabbing Slater but stated that he sought to feign her death so that the others would leave her alone. The theory was also supported by Bush's claims that Pig Parker had attempted to force Bush to take the gun and to shoot Slater, but that Bush refused. In addition, the examining physician testified that the stab wound was superficial and not fatal. Muschott emphasized these aspects of the evidence during the guilt/innocence phase of the trial, along with the voluntariness of Bush's confessions and assistance to the investigating officers. After considering the evidence, however, the jury convicted Bush.

The district court described Muschott's reasons for not presenting evidence in mitigation during the sentencing phase of the trial as follows:

Mr. Muschott chose [not to present] what he had regarding Bush's family background, prison experience, and possible intoxication or mental disability. He made his decision for three reasons: (1) there was no mental disability to exploit and any attempt to create one would only have damaged his credibility with the jury; (2) Bush had confessed that he knew what he was doing on the night of the murder and any post-trial attempt to show intoxication would, likewise, have damaged his credibility; and (3) any evidence offered in an attempt to paint Bush as a docile, sympathetic and "sheeplike" follower would have been false, as well as unsuccessful, and would have invited the prosecutors to offer de-

BUSH v. SINGLETARY

Cite as 988 F.2d 1082 (11th Cir. 1993)

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tails of the prior rape,² robbery and kidnapping in rebuttal.

Id. at 15.

Muschott decided, instead, to ask the jurors, at sentencing, to take with them to the jury room the recording of Bush's third statement. This statement was the only one, in Muschott's opinion, in which Bush appeared remorseful. He hoped that by leaving the jury with a sympathetic presentation of Bush and by not inciting the prosecution to present the details of the 1974 rape, he could avoid the death penalty for his client. He was concerned that Bush might appear cold or unremorseful and might be led by the prosecutor to testify to his own detriment, so Muschott discussed the situation with Bush, Bush's father, and Bush's brother. Bush decided not to testify at sentencing.

Against Muschott's advice, however, during the sentencing hearing, Bush decided to take the stand. After a brief direct examination by Muschott, Bush argued with the prosecution on cross-examination, repeatedly challenged the prosecutor to prove the case against him, and could not remember what, if anything, the victim had said before she died. R.7 at 1187-1267, Sentencing Transcript (cross-examination of Bush).

[11,12] Bush now contends that his counsel was ineffective because he failed to investigate and present mitigating evidence at sentencing. Counsel must investigate defendant's background before sentencing. *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir.1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987). The adequacy of the scope of an attorney's investigation is to be judged by the standard of reasonableness. *Mitchell v. Kemp*, 762 F.2d 886, 888 (11th Cir.1985), *cert. denied*, 483 U.S. 1026, 107 S.Ct. 3248, 97 L.Ed.2d 774 (1987). After an adequate investigation, counsel may reasonably decide not to present mitigating character evidence at sentencing. *Stanley v. Zant*, 697 F.2d 955, 961-62 (11th Cir.1983), *cert. de-*

nied, 467 U.S. 1219, 104 S.Ct. 2667, 81 L.Ed.2d 372 (1984).

[13] Bush first contends that Muschott should have presented evidence detailing Bush's sympathetic background, including his disadvantaged childhood and his prison experience. The district court found that Muschott investigated Bush's personal background and evaluated the usefulness of the character and background information. Muschott decided that this evidence was not significantly beneficial to his client's case and chose not to use it because of his belief that the State would have introduced, in rebuttal, evidence of Bush's violent past and the facts regarding his prior rape conviction. These findings have support in the district court record.

Muschott discussed possible mitigating evidence with Bush, his brother, his father, his girlfriend, and his brother-in-law. Muschott was well aware of Bush's poor family background and the fact that he had been abused while in prison. The district court found that both Bush's father and brother indicated they did not want to testify, and no other family member came forward despite Muschott's willingness to talk with them. We find no error in the district court's conclusion that Muschott's evaluation of this potential evidence as not "significantly beneficial" was a professionally reasonable one.

[14] The contention that Muschott failed to investigate and present evidence of Bush's intellectual and psychological impairments is similarly without merit. After Muschott investigated the possibility of psychological mitigation, he concluded that this avenue was one he could not develop. The district court evaluated the evidence on this issue and found that Muschott did not believe, nor did he have reason to believe, that Bush was mentally deficient.

In addition to the information revealed through Muschott's conversations with Bush, Bush's lawyer for the earlier criminal case and Bush's family, Muschott was

several young men who kidnapped, robbed, and raped a woman.

aware of a number of facts also known by the prosecution that would rebut an allegation of mental deficiency. Muschott testified that Bush had no problems communicating and gave no indication that he was ever out of touch with reality. Bush displayed intelligence during the events at issue, during his interrogations by law enforcement, and during trial. He demonstrated the ability to formulate options and to make his own decisions. For example, although his accomplices suggested shooting the police officer who stopped them after the murder for a defective taillight, Bush persuaded them to "wait and see what happens." R.G. at 383, Transcript of Evidentiary Hearing (Muschott's recollection of the events). The police officer who had stopped the men in the car described Bush, who was driving and who owned the vehicle, as "calm, cool, and collected." *Id.* Bush instituted measures to regain possession of his car after the police confiscated it. Bush's actions also revealed his appreciation of the criminality of his conduct. He hid the murder weapon. He gave four statements to the police, initially claiming an alibi and later explaining his involvement in the crimes.

Muschott discussed what he knew about petitioner with a psychiatrist, Dr. Tingle, who determined that he could not assist in the defense of the petitioner in the guilt or sentencing phases of the trial. The district court recognized that

Muschott weighed the very questionable beneficial value of a defense based on psychology against the very real threat that such a defense would open the door for the state to introduce in rebuttal, the details of the 1974 rape and damaging statements of Bush's codefendants. He decided that the real threat outweighed the potential benefit.

District Court Opinion at 34.

Muschott chose not to investigate Bush's psychological history more thoroughly, not to have Bush examined by a psychiatrist or psychologist, and not to present mitigating psychological evidence at the sentencing hearing. Given what Muschott could readily observe about Bush, what Muschott

knew of Bush's background and the advice of Dr. Tingle, Muschott acted within the wide range of reasonable professional judgment.

[15] Bush also argues that Muschott failed to investigate and present evidence to show that Bush did not kill or intend to kill. The record does not support this argument. Bush alleges that Muschott should have introduced the statement of Georgiana Williams, Bush's girlfriend, that one of the codefendants had confessed to her that he, not Bush, shot the victim. With the exception of an isolated comment by the prosecution, there was no indication throughout the trial that Bush was the shooter. All of the evidence presented indicated that Bush stabbed the victim and a codefendant shot her. Counsel could quite reasonably believe that the introduction of this statement from Bush's girlfriend would contribute nothing to the sentencing phase of the trial and the jury might have perceived it as self-serving.

There is no reasonable argument to be made under the facts to support Bush's argument that his lawyer should have presented evidence that Bush was physically or psychologically coerced into participating in the underlying felony or in the murder of Ms. Slater. The record clearly indicates Bush's own statements to the contrary. Bush admitted that he agreed with the others to rob someone. R.4 at 755, Trial Transcript. He was an active participant in the robbery and kidnapping. A witness identified Bush as one of the men seen in the store where Slater worked, not the one waiting in the car; Bush admitted to owning both the getaway car and the murder weapon; and he did all the driving on the night of the crime. Bush had already stated that he knew what he was doing throughout the commission of the robbery, kidnapping, and murder.

Muschott's approach to the evidence concerning the extent of petitioner's involvement was reasonable. We agree with the district court that "*Strickland* does not compel an attorney to urge an argument which he reasonably finds to be futile, let

L.Ed.2d 652 (1992); *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir.1988). At least since *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2605, 57 L.Ed.2d 973 (1978), the importance of presenting mitigating evidence has been a prominent feature of the Supreme Court's Eighth Amendment jurisprudence. See, e.g., *McKoy v. North Carolina*, 494 U.S. 433, 444, 110 S.Ct. 1227, 1234, 108 L.Ed.2d 369 (1990) (quoting *Perry v. Lynaugh*, 492 U.S. 302, 327, 109 S.Ct. 2934, 2951, 106 L.Ed.2d 256 (1989)); *Skipper v. South Carolina*, 476 U.S. 1, 4-5, 106 S.Ct. 1669, 1670-71, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12, 102 S.Ct. 869, 874-75, 71 L.Ed.2d 1 (1982). Making the sentencer aware of all relevant mitigating circumstances is necessary to give practical meaning to the bedrock Eighth Amendment principle that "respect for humanity . . . requires consideration of the character and record of the individual offender" in capital cases. *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)). Reasonable investigation, therefore, (which includes making reasonable decisions not to pursue certain inquiries) is an absolute prerequisite for constitutional assistance of counsel. When counsel breaches the duty of reasonable investigation, even strategic or tactical decisions regarding the sentencing phase, which normally are entitled to great deference, must be held constitutionally deficient. See, e.g., *Horton*, 941 F.2d at 1462.

In my opinion, Muschott failed to conduct even a minimally adequate search into Bush's background. At the evidentiary hearing in the district court, Muschott conceded that he prepared no mitigating evidence whatsoever to present at sentencing. Dist.Ct.Tr. at 402. He never looked into Bush's psychological history. He never sought Bush's school or prison records. *Id.* at 319. He never developed evidence of the hardships of Bush's abusive and tragic life growing up in a family of seasonal

farmworkers. *Id.* at 321. He never developed any evidence that might have explained or softened the effect on the jury of Bush's 1974 conviction.¹ *Id.* at 344. These items were not hidden facts, discoverable only through substantial effort. They were basic background facts and records which the most cursory investigation and preparation would have revealed. And, significantly, Muschott admitted that he did not have a reasonable, tactical reason for not seeking or developing much of this evidence. See, e.g., *id.* at 319. He simply did not do it.

Had Muschott conducted a competent investigation he would have discovered information that certainly would have informed, and might very well have altered, his decision not to present any evidence in mitigation. A 1974 report that was included in Bush's incarceration records, for example, stated that Bush had an obsessive-compulsive personality with an incipient pathology, uncertain control of his impulses, and sometimes loosened ties to reality. The reporting doctor worried that Bush was primed for a "possible future psychosis" which might be hastened by "any stress situation."² This warning is consistent with the testimony in the district court of Dr. Carbonell, who reported that Bush possesses borderline intellectual functioning and possibly suffers from brain damage and other mental health problems. It suggests that Bush may have suffered from a severe emotional disturbance at the time of the homicide in this case, a statutory mitigating circumstance under Florida law. Fla.Stat. Ann. § 921.141(6)(b). Even if Bush's mental health problems did not rise to the level of a severe emotional disturbance, the 1974 report identifies some mental health problems which could have been introduced at the penalty phase as a non-statutory mitigating circumstance. At the very least, the report would have placed Muschott on notice that further investiga-

1. In fact, Muschott admitted he never even obtained the transcript of, or the Division of Youth Services records about, that case. Dist.Ct.Tr. at 296.

2. Bush's subsequent years in prison where, as a teenager, he apparently was raped and assaulted would undoubtedly constitute a "stress situation."

aware of this information, he might very well have chosen to introduce humanizing evidence of Bush's family background and character traits, knowing that if the State attempted to countermand that evidence with the 1974 crime, he could surmount with the statements of the Florida officials.

In sum, Muschott's investigative effort in preparing for the penalty phase of Bush's trial amounted to one short conversation with Dr. Tingle based solely on Muschott's own inconsiderable and untrained observations and a few conversations with Bush's father, brother, and girlfriend, most of which were initiated by them. In my view, Muschott failed to discharge his duty of reasonable investigation. Consequently, his strategy at sentencing—doing nothing more than asking the jury to listen to the one of Bush's four statements in which he sounded most remorseful—was constitutionally tainted.

Muschott also failed to render constitutionally adequate assistance of counsel when he chose not to introduce mitigating evidence that could not reasonably have opened the door to damaging evidence in rebuttal. Muschott feared that if he introduced mitigating evidence, including Bush's sympathetic background and intellectual and mental health deficiencies, the State would introduce statements by Bush's codefendants that his involvement in the murder had been extensive, as well as details of the 1974 crime. Much of the mitigating evidence that might have persuaded the jury to vote for life, however, was completely distinct from this potential rebuttal evidence. That Bush is the loving father of a daughter with Down's Syndrome or once saved a drowning child, for example, has nothing to do with the details of the 1974 crime or the extent to which Bush participated in the murder, and cannot reasonably have given rise to the fear of rebuttal. The same goes for Bush's

6. In addition, the judge had ruled that Bush's inability to cross-examine the codefendants at sentencing rendered their statements about the extent of Bush's participation in the crime inadmissible. See Sentencing Hearing Tr. at 48-49.

mental health problems and for the hardships Bush endured as an abused child in a family of seasonal workers, with a disabled and alcoholic father and a mother who died when he was just a boy.⁶

I agree with the majority that Muschott acted reasonably when he asked the jury to listen to the statement in which Bush sounded most remorseful. The Sixth Amendment problem in this case is not with what Muschott did but what he did not do. He did not conduct a constitutionally adequate investigation into Bush's background and he did not introduce significant evidence that could not reasonably have given rise to damaging rebuttal. That counsel made many competent decisions does not preclude a finding of ineffective assistance of counsel. The right to effective assistance of counsel may be violated "by even an isolated error of counsel if that error is sufficiently egregious and prejudicial."⁷ *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986); accord *Strickland*, 406 U.S. at 693-96, 104 S.Ct. at 2067-69; *United States v. Cronin*, 466 U.S. 648, 657 n. 20, 104 S.Ct. 2039, 2046 n. 20, 80 L.Ed.2d 657 (1984). Muschott's abdication of his responsibility to investigate and present mitigating evidence was a significant error, in my view, more than sufficiently egregious to implicate Bush's right to constitutionally effective counsel. The range of professional judgment acceptable under the Sixth Amendment is wide, but not boundless.

II.

The majority also errs in holding that Bush does not satisfy the prejudice prong of *Strickland*. Contrary to the majority's summary conclusion, a reasonable likelihood does exist that but for Muschott's constitutionally deficient performance Bush's jury would have rejected the death penalty. All that is necessary to satisfy

7. For the same reason, the fact that Bush took the stand at the sentencing phase is not determinative of the Sixth Amendment issue in this case. That Bush himself made a tactical error when he insisted on testifying does not render Muschott's independent failure to prepare for sentencing any more constitutionally palatable.

the prejudice prong in this case is a reasonable probability that *one* additional juror would have voted for life. A reasonable probability is simply a likelihood sufficient to undermine confidence in the jury's death recommendation, not even proof by a preponderance of the evidence. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2068. Notwithstanding Muschott's constitutionally inadequate performance, the State could muster only seven votes for death. Under Florida law a six-six split constitutes a recommendation against the death penalty. *See Harich v. State*, 437 So.2d 1082, 1086 (Fla.1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984). The sentencing judge can override such a recommendation only if the facts suggesting a death sentence are so clear and convincing that virtually no reasonable person can conclude that life imprisonment is an appropriate sentence. *See Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). That standard could not have been met in this case.

Abundant mitigating evidence was available to humanize Bush in the eyes of the jury, including his loving devotion to his child suffering from Down's Syndrome and his borderline intellectual functioning (if not more serious mental health problems). If only some of that evidence had been introduced, the State would not have been able to emphasize to the jury, as it did, that "[t]here has been no testimony concerning the character of the defendant other than the fact that he was previously convicted of a serious crime." Sentencing Hearing Tr. at 155. Because no mitigating evidence whatsoever was introduced, the jury was left with only the prosecution's view: that John Earl Bush possessed no positive human qualities worth sparing.

In *Blanco v. Singletary*, *supra*, we wrote:

Given that some members of Blanco's jury were inclined to mercy even without having been presented with any mitigating evidence and that a great deal of mitigating evidence was available to Blanco's attorneys had they more thoroughly investigated, we find that there was a reasonable probability that Blan-

co's jury might have recommended a life sentence absent the errors.

943 F.2d at 1505. Likewise, in this case, nearly half of Bush's jurors were inclined to mercy notwithstanding Muschott's defective performance. Substantial mitigation was available if Muschott had only conducted a basic investigation. There is far more than a mere reasonable probability that John Earl Bush today faces execution because of constitutionally ineffective assistance of counsel.

Accordingly, I respectfully dissent from the denial of habeas relief as to sentencing.



Reinhold DIDIE, Plaintiff-Appellee.

Hakan Bennhagen, Plaintiff,

v.

Ashley HOWES, Jr., Defendant-Appellant.

No. 91-5797.

United States Court of Appeals,
Eleventh Circuit.

April 20, 1993.

Appeal was taken from order of the United States District Court for the Southern District of Florida, No. 89-1008-CV-LCN, Lenore Carrero Nesbitt, J., denying pro se motion for Rule 11 sanctions in action arising from contract to restore yacht. The Court of Appeals, Birch, Circuit Judge, held that district court abused its discretion in not holding hearing to determine whether Rule 11 sanctions were appropriate when it denied pro se Rule 11 motion.

Reversed and remanded.

Attachment B

STATEMENT OF COUNSEL AND STATEMENT
OF THE ISSUES/QUESTIONS PRESENTED

Counsel express a belief, based upon a reasoned and studied professional judgment, that the panel decision is contrary to the decisions of the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit which are listed below, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions and an application of precedent in conformity with the standards of the United States Supreme Court and this Circuit. Counsel also express a belief that the issues presented involve important questions whose resolution by the full Court shall aid in maintaining uniformity of the decisional law of this Circuit and conformity with the decisional law of the United States Supreme Court.

I. As to the issue presented in section I:

Appellant respectfully submits that the decision of the panel majority on his claim of ineffective assistance of counsel at capital sentencing is in conflict with the precedent of this Circuit in cases such as Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1992); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987); and Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987).

As Judge Kravitch discussed in her dissent, see Bush v. Singletary, No. 89-405 (11th Cir. March 30, 1993) (appended at App. A hereto), although trial defense counsel said he had a "tactic" at the hearing, that "tactic" cannot be deemed "informed" or "reasonable" under the established precedent of this Circuit. Moreover, as Judge Kravitch's dissent also discusses, although the panel devoted little analysis to the question of prejudice, the panel majority's analysis cannot be squared with the fact that this Circuit has on numerous previous occasions "held that a failure to present similar [and indeed, less substantial] mitigating evidence at sentencing ... was sufficient to establish prejudice." Horton v. Zant, 941 F.2d at 1463. See also App. C (outlining the mitigation).

As a matter of this Circuit's law, Appellant established that counsel's performance was deficient and that he was prejudiced. The panel majority's opinion is not only inconsistent with the Circuit's law, at its essence it overrules that law. Appellant accordingly submits that rehearing and en banc review are appropriate to resolve the conflicts between the majority opinion in Bush and the precedent of this Circuit -- precedent embodied in the decisions listed above and in Judge Kravitch's dissent.

If an attorney's asserted "tactic", even when based on inadequate investigation and preparation, insulates that attorney against a claim of ineffective assistance of counsel, the full Court should say so. The panel majority's opinion essentially overrules the holdings of Horton and Blanco -- each holding that

"tactics" must be informed and reasonable -- and it will affect future cases. The analysis of this case pursuant to the Circuit's pre-Bush law embodied in Judge Kravitch's dissent (and a comparison of that analysis to the majority's opinion) demonstrates that review by the full Court is necessary to maintain uniformity in the Circuit's decisional law.

II. As to the issue presented in section II:

Appellant respectfully submits that rehearing and review by the full Court are appropriate to resolve the conflict between the panel majority's holding and the Supreme Court's decisions in Enmund v. Florida, 458 U.S. 782 (1982); Cabana v. Bullock, 474 U.S. 376 (1986); and Tison v. Arizona, 107 S.Ct. 1676 (1987). Enmund, Bullock and Tison hold that a death sentence cannot be imposed on one who does not kill, intend to kill or attempt to kill. To effectuate this eighth amendment requirement, these Supreme Court precedents require the state courts to find at least that the defendant was a "major participant" and that he either intended death or had a reckless indifference to human life. As the panel majority opinion indicates, neither the jury's verdict nor the Florida Supreme Court's direct appeal opinion can be viewed as making the requisite findings in Appellant's case. See Bush v. Singletary (majority opinion), slip op. at 8-9. The panel, however, denied relief by holding that the trial judge's statement when he rejected the statutory "accomplice whose participation was relatively minor" mitigating factor was sufficient. Cf. App. D (analyzing the state courts' rulings on the issue). All that the

trial judge said, however, was that Mr. Bush was a "participant" -- all that he found was the first part of the two-part finding which Tison requires. Nowhere did the jury, Florida Supreme Court or trial judge find that Mr. Bush intended to kill, attempted to kill or was recklessly indifferent to human life. See, e.g., Bush (majority opinion), slip op. at 9 (quoting trial judge's statement); see also App. D (analyzing the state courts' rulings in this case in light of Enmund, Bullock and Tison).

Bullock and Tison expressly hold that state court "sufficiency" determinations -- that as a matter of accomplice law the defendant should be held responsible -- are insufficient to meet the eighth amendment requirement of findings of fact as to the defendant's mental state. In Appellant's case, the state courts' rulings involve no more than such a "sufficiency" determination. The panel's ruling is not in accord with the Supreme Court's precedent.

Appellant submits (complemented by the analysis included in App. D hereto) that the panel majority's decision is in conflict with the decisions of the United States Supreme Court in Enmund v. Florida, Cabana v. Bullock and Tison v. Arizona and that rehearing and review by the full Court are appropriate to maintain uniformity between the decisional law of this Circuit and the law of the United States Supreme Court.

Billy D. Nolan
COUNSEL FOR PETITIONER/APPELLANT

PROCEDURAL HISTORY

Four tape recorded statements obtained by law enforcement officers from Mr. Bush were played during the trial. These statements "constitute the only known version of the events"

Bush v. State, 461 So.2d 936, 937 (Fla. 1985). The statements were

to the effect that [Mr. Bush] did not realize that his accomplices, Alfonso Cave, "Pig" Parker and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination. Bush states that after the robbery, they drove toward Indiantown, when his accomplices ordered him to stop. The victim was pushed out of the car and Bush avers that he intended to set her free. However, the accomplices decided that Slater might be able to identify them and they told Bush to dispose of her. Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially. Slater fell to the ground and an accomplice, Parker, shot her.

Bush, 461 So.2d at 938. The testimony of the medical examiner, Dr. Wright, confirmed that the knife wound was superficial (ROA 465) and that Ms. Slater died as a result of the gunshot wound (ROA 471).

The jury convicted. At sentencing, defense counsel offered no evidence in mitigation. "[T]he jury recommended, in a 7-5 advisory sentence, that the death penalty be imposed. The trial judge, citing three aggravating factors and no mitigating factors, sentenced Bush to death." Bush, 461 So.2d at 938.

The convictions and death sentence were affirmed on direct appeal. Bush v. State, 461 So.2d 936 (Fla. 1985). The subsequent history of this case was outlined by the panel. See Bush v. Singletary (majority opinion), slip op. at pp. 3-6.

REASONS FOR GRANTING REHEARING AND EN BANC REVIEW

(I)

THE CONFLICTS BETWEEN BUSH AND THIS COURT'S PRECEDENT ADDRESSING QUESTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT CAPITAL SENTENCING

A. Introduction

"To investigate and develop available mitigating evidence is a basic and unshakable obligation of defense counsel in all capital cases." Bush v. Singletary, (Kravitch, J., dissenting) at dissent p. 1, citing Strickland v. Washington, 466 U.S. 668, 691 (1984); Blanco v. Singletary, 943 F.2d 1477, 1500 (11th Cir. 1991); Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991); Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). As Judge Kravitch noted, because "[r]easonable investigation ... [is a] prerequisite for constitutional assistance of counsel," "[w]hen counsel breaches the duty of reasonable investigation, even strategic or tactical decisions regarding the sentencing phase ... must be held constitutionally deficient." Id. at 2, citing Horton, 941 F.2d at 1462. Judge Kravitch's opinion is included in the appendix hereto at App. A.

As a matter of this Circuit's law (see Blanco, Horton, Blake, Armstrong, Cunningham, Stephens, Middleton, Maqill, Harris, supra) counsel breached the constitutional duty in this case. He failed to investigate just as the attorneys in each of the cases listed above failed to investigate. See Bush, supra (Kravitch, J., dissenting).

Counsel admitted at the evidentiary hearing that he undertook no efforts which can be deemed "reasonable" investigation or preparation under the law of this Circuit. See App. B (analyzing counsel's hearing testimony pursuant to the law of the Eleventh Circuit). As a result, a substantial body of available mitigating evidence was not known to counsel and, consequently, not heard by the jury and judge at sentencing. This evidence -- outlined in detail in the materials included in Appendix C -- exceeds what has been found sufficient to establish "prejudice" as a matter of this Circuit's law in Blanco, Horton, Armstrong, Middleton, Stephens, Harrie, inter alia. See also Bush (Kravitch, J., dissenting) (App. A); App. B, part C (analyzing the issue of "prejudice" pursuant to this Circuit's law).

Judge Kravitch's opinion and the materials appended hereto demonstrate that under the pre-Bush law of this Circuit, counsel's performance could not be deemed informed or reasonable. He did not adequately investigate and prepare. Indeed, as counsel himself acknowledged when he testified at the hearing, this attorney had no "tactic" for his failure to investigate. See App. B; see also App. A. The proper development of mitigating evidence would have been important not only for its own value, but also for the effect that a properly developed penalty phase case would have had on a reasonable attorney's decisions. See Blanco, supra.

Given these circumstances, the pre-Bush law of this circuit established that counsel's decisions could not be deemed "reasonable". See Blanco v. Singletary, 943 F.2d 1477, 1500-1503

(11th Cir. 1991); Horton v. Zant, 941 F.2d 1449, 1460-63 (11th Cir. 1991) (each holding expressly that under the law of this Circuit, an attorney's failure to investigate and prepare appropriately precludes the making of choices which can be deemed "reasonable" and that the decisions of counsel under such circumstances cannot be deemed a "reasonable tactic" as a matter of law).

Counsel testified that the course he followed, without adequately investigating in the first instance, was to present no mitigation to support a verdict of life and he, in fact, developed and presented no mitigating evidence (See App. B). Given the nature of Florida's sentencing scheme -- that a jury recommendation of life without a "reasonable basis" in the record such as mitigating evidence supporting it may be overridden, Stevens v. State, 552 So.2d 1082, 1085 (Fla. 1989) -- and given counsel's own testimony that there was a "consensus" and "substantial likelihood" that the death penalty "would be imposed [by the judge] regardless of the jury's recommendation" (Tr. 363) (emphasis added), counsel's failure to develop and present any mitigation cannot be deemed adequate attorney performance under this Court's law. With such a "substantial likelihood" that death would be imposed by the judge regardless of the jury's verdict, it was especially important for counsel to develop and present mitigation in order to establish a "reasonable basis" for a life recommendation. See Porter v. Wainwright, 805 F.2d 930, 936 (11th Cir. 1986), relied upon in Stevens, 552 So. 2d at 1086-87.

Counsel's failure to develop mitigating evidence here was unreasonable because it was a decision that made a sentence of death more likely, whether or not the jury recommended life; because of the facts elicited from him and the prosecutor at the hearing demonstrating that there was no true rebuttal for most of the mitigating evidence which could have been presented (see App. A, opinion of Judge Kravitch); and because counsel's decision was made without the benefit of a reasonable and adequate investigation and development of available mitigating evidence (See App. B; see also App. A, opinion of Judge Kravitch).

Given this record, Judge Kravitch's dissent explained that the majority's analysis could not be sustained under the law of this Circuit or the Supreme Court's current eighth amendment jurisprudence. Bush v. Singletary, No. 89-4051 (11th Cir. March 30, 1993) (Kravitch, J., dissenting). Judge Kravitch's analysis of the relevant caselaw and its application to Mr. Bush's case directly establishes that the panel majority's decision is at odds with this Circuit's law. Her opinion speaks for itself with a clarity that would be disserved by an attempt at paraphrasing. Judge Kravitch's opinion is therefore appended to this petition and incorporated herein, and Appellant respectfully refers the Court to its analysis (App A).

B. Discussion

The panel majority opinion stands in conflict with the law this Circuit has consistently applied to resolve claims of ineffective assistance of counsel at capital sentencing. This case

involves an attorney who knew the trial judge was inclined to impose death irrespective of the jury's decision, but who nevertheless undertook little effort to develop evidence in mitigation and then presented none. Given the evidence at trial (see Procedural History, supra) and the jury's 7-5 vote, any effort by counsel to present mitigating evidence could have resulted in a life recommendation from the jury. See Blanco, 943 F.2d at 1305. Moreover, evidence such as that involved in this case (see App. C) would have established a "reasonable basis" for life as a matter of Florida law, thus protecting the jury's verdict against a judicial override. See Porter, supra. And, as a matter of its own law, this Circuit has held that mitigating factors such as those involved in this case establish that Appellant was prejudiced. See Blanco; Horton.

Without any presentation by counsel, however, the prosecutor was allowed to argue for death to the jury and judge because: "There has been no testimony concerning the character of the defendant other than the fact he was previously convicted of a serious crime" (ROA 1279). As Judge Kravitch explained, even "[t]aking into consideration any evidence or argument the state might conceivably have produced in rebuttal," Stephens, supra, Mr. Bush established deficient performance and prejudice under the law of this Circuit. Bush (Kravitch, J., dissenting) (App. A). That law, embodied in precedents such as Blanco, Horton, Cunningham, Stephens, Middleton, Porter, Harris, Magill, and Blake, cannot be squared with the panel majority's decision. Judge Kravitch's

dissent compellingly demonstrates why.

If this Circuit's law is to be altered to hold that any "tactic" asserted by counsel, irrespective of this Circuit's prior cases addressing similar circumstances, will insulate that lawyer against a claim of ineffective assistance of counsel, Appellant respectfully submits that the full Court should say so. Even under such a standard, Appellant's case remains a compelling one, for it is difficult to conceive of any attorney who would choose to put on nothing in mitigation (and thus to present no "reasonable basis for life") when he knows in advance that the judge is inclined to impose death regardless of the jury's decision. That is what counsel "chose" to do here. And he made that "choice" on the basis of an "investigation" that was far from adequate or reasonable. See Bush, (Kravitch, J., dissenting) (appended hereto at App. A).

The majority opinion changes the law of this Circuit. The majority opinion will affect future cases presenting claims of ineffective assistance of counsel at capital sentencing. This case warrants the granting of rehearing and en banc review in order for the conflicts between this decision and the decisions in cases such as Blanco, Horton, and the others identified above to be resolved and in order for the en banc Court to inform practitioners and subsequent panels of the standards under which they should operate when evaluating claims of ineffective assistance of counsel at capital sentencing.

(II)

THE CONFLICT WITH
ENMUND, BULLOCK, AND TISON

A. Introduction

John Bush's statements "constitute the only known version of the events," Bush v. State, 461 So.2d 936, 937 (Fla. 1985), and were "to the effect that he did not realize that his accomplices, Alfonso Cave, 'Pig' Parker and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination." Id. at 937-38. "[A]fter the robbery, they drove toward Indiantown, when his accomplices ordered him to stop. The victim was pushed out of the car and Bush avers that he intended to set her free. However, the accomplices decided that Slater might be able to identify them and they told Bush to dispose of her. Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially." Bush, 461 So.2d at 938. "[A]n accomplice, Parker, shot her." Id. The medical examiner confirmed that the stab wound was superficial and could not have caused death, and that Ms. Slater died as a result of the gunshot wound (R. 465, 471).

The eighth amendment does not permit "imposition of the death penalty on one ... who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Enmund v. Florida, 458 U.S. 782, 797 (1982). Under Enmund, "[t]he focus must be on [the defendant's] culpability, not on that of [the accomplice] who ...

shot the [victim], for we insist on 'individualized consideration as a constitutional requirement in imposing the death penalty...' " Enmund, 458 U.S. at 798, relying on Lockett v. Ohio, 438 U.S. 586, 605 (1978), and Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

As in Enmund, so too in this case the Florida Supreme Court affirmed the death penalty in the absence of record proof that Mr. Bush "killed or attempted to kill, and regardless of whether he intended or contemplated that life would be taken." Enmund, 458 U.S. at 801. Such a finding would have contradicted the very facts found by the Florida Supreme Court in its recitation concerning what this record disclosed.

In Cabana v. Bullock, 474 U.S. 376 (1986), the Supreme Court further explained that the mental state finding required by Enmund must be made by the state courts. The Bullock Court also cautioned that federal reviewing courts were not to rely on or deem sufficient state court findings that the defendant a) was an active or major participant, and/or b) that there was "sufficient" evidence in the record from which a finding as to the defendant's culpability could be made. Cabana v. Bullock, 474 U.S. at 389-90. Enmund v. Florida, Cabana v. Bullock, and Tison v. Arizona (discussed below) require a finding of fact from the state courts as to the defendant's individual mental state, not a sufficiency determination -- i.e., not, as here, a ruling that participation in felonies can be deemed sufficient to constitute the intent required

by Enmund.¹

In Tison v. Arizona, 107 S. Ct. 1676 (1987), the Supreme Court reiterated that a finding of major or active participation and contribution to the victim's death does not constitute the requisite finding of individual culpability. Tison, 107 S. Ct. at 1688. Tison held that the state courts must make a finding of intent or, at a minimum, "reckless indifference to human life" before the death penalty can satisfy the Enmund culpability requirement. Because the state courts had found major participation, see Tison, 107 S. Ct. at 1688, ("The petitioner's own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, 'substantial'"), but not intent or "reckless indifference to human life," the Supreme Court, relying on Cabana v. Bullock, held:

The Arizona courts have clearly found that the former [major or active participation] exists; we now vacate the judgments below and remand for determination of the latter [intent or reckless indifference to human life] in further proceedings not inconsistent with this opinion.

Tison v. Arizona, 107 S. Ct. at 1688.

As in Tison v. Arizona and Cabana v. Bullock, Mr. Bush's case involves a "sufficiency" ruling -- that there were actions which

¹ Thus, the Mississippi Supreme Court's express holdings that "[t]he evidence is overwhelming that [Bullock] was present, aiding and assisting in the assault upon, and slaying of [the decedent]," and that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon [the decedent]," Cabana v. Bullock, 474 U.S. at 389 (emphasis added), quoting Bullock v. State, 391 So.2d 601, 606, 614 (Miss. 1980), were deemed insufficient to establish the requisite findings of fact on individual culpability because they constituted only a finding of major participation. Bullock, 474 U.S. at 389-90.

contributed to the crime, Bush, 461 So.2d at 936 -- but is devoid of a state court finding of fact that Mr. Bush's intent was an intent to kill or that his mental state was one of reckless indifference to human life. As in Tison and Bullock, the ruling of the state courts in this case is at its essence a ruling that by "legal definition" Mr. Bush should be held responsible. See Bullock, 474 U.S. at 390.²

B. Discussion

To effectuate the eighth amendment principles embodied in Enmund, the Supreme Court has held that the state courts must expressly find at least that the defendant was a "major participant" and either intended to kill or had a "reckless indifference" to human life. Tison; Bullock. Participation and mental state findings are needed under Tison and Bullock.

Although acknowledging that the mental state finding was not made by the jury or Florida Supreme Court, see Bush (majority opinion), slip op. at 8-9, the panel majority ruled that a statement made by the trial judge when rejecting the statutory "accomplice whose participation was relatively minor" mitigating factor was sufficient. All that the judge's statement indicates, however, was that the judge was going to reject the mitigator because he believed Mr. Bush was a "participant". See Bush, slip

² See also Bullock, 474 U.S. at 389 (finding inadequate the state supreme court's findings that "[t]he evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson" and that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson.")

op. at 9 (quoting the statement). All that the judge found was the first part of the two-part finding which Tison and Bullock require.

Nowhere did the jury, Florida Supreme Court or trial judge find that Mr. Bush intended to kill, attempted to kill or was recklessly indifferent to human life. See, e.g., Bush (majority opinion), slip op. at 9 (quoting trial judge's statement); see also App. D (analyzing the state courts' rulings in this case in light of Enmund, Bullock and Tison). There is no express mental state finding ("intent"/"reckless indifference") from the jury, Florida Supreme Court or trial judge here. See App. D.

Bullock and Tison expressly hold that state court "sufficiency" determinations -- that as a matter of accomplice law the defendant should be held responsible -- are insufficient to meet the eighth amendment requirement of express findings of fact as to the defendant's mental state. In Appellant's case, the state courts' rulings involve no more than such a "sufficiency" determination. The panel's ruling is not in accord with the Supreme Court's precedent.

Appellant submits (complemented by the analysis included in App. D hereto) that the panel majority's decision is in conflict with the decisions of the United States Supreme Court in Enmund v. Florida, Cabana v. Bullock and Tison v. Arizona and that rehearing and review by the full Court are appropriate to maintain uniformity between the decisional law of this Circuit and the law of the United States Supreme Court.

CONCLUSION

On the basis of the foregoing, Appellant prays that the Court grant rehearing and en banc review.

Respectfully submitted,




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(Counsel for Petitioner/Appellant)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Celia A. Terenzio, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 4th day of June, 1993.


Attorney
THOMAS H. DUNN

Attachment C

DEATH PENALTY

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-4051

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JUL 20 1993

MIGUEL J. CORTEZ
CLERK

JOHN EARL BUSH,

Petitioner-Appellant,

versus

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN
BANC

Before: KRAVITCH, EDMONDSON and COX, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

() The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

Attachment D

ORD-42
(9/91)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 89-4051

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

AUG - 9 1993

MIGUEL J. CORTEZ
CLERK

Petitioner-Appellant,

JOHN EARL BUSH,

versus

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ORDER:

- () The motion of appellant, John Earl Bush,
for (X) stay () recall and stay of the issuance of the mandate
pending petition for writ of certiorari is DENIED.
- ~~(X)~~ The motion of appellant, John Earl Bush,
for (X) stay () recall and stay of the issuance of the mandate
pending petition for writ of certiorari is GRANTED to and including
October 18, 1993, the stay to continue in force until the final
disposition of the case by the Supreme Court, provided that within
the period above mentioned there shall be filed with the Clerk of
this Court the certificate of the Clerk of the Supreme Court that the
certiorari petition has been filed. The Clerk shall issue the
mandate upon the filing of a copy of an order of the Supreme Court
denying the writ, or upon expiration of the stay granted herein,
unless the above mentioned certificate shall be filed with the Clerk
of this Court within that time.
- () The motion of _____
for a further stay of the issuance of the mandate is GRANTED to and
including _____, under the same conditions as set
forth in the preceding paragraph.
- () IT IS ORDERED that the motion of _____
for a further stay of the issuance of the mandate is DENIED.


UNITED STATES CIRCUIT JUDGE

Attachment E

John Earl BUSH, Appellant,

v.

STATE of Florida, Appellee.

No. 62947.

Supreme Court of Florida.

Nov. 29, 1984.

Rehearing Denied Jan. 31, 1985.

Defendant was convicted of first-degree murder in the Circuit Court for Martin County, C. Pfeiffer Trowbridge, J., and was sentenced to death in accordance with jury's advisory sentence recommendation. Defendant appealed both conviction and sentence. The Supreme Court, Adkins, J., held that: (1) prosecutor's failure to inform defense of change in witness' testimony was not discovery violation and did not require either mistrial or *Richardson* inquiry; (2) defendant's confession given 11 hours after *Miranda* warning was admissible; (3) photographs of victim's dead body were admissible; (4) dismissal of prospective juror for cause was proper because of her attitude toward death penalty; and (5) prosecutor's plea for retribution in closing statement did not merit resentencing.

Affirmed.

Ehrlich, J., specially concurred and filed opinion, in which Alderman and Shaw, JJ., concurred.

Overton and McDonald, JJ., concurred in result only of the sentence.

1. Criminal Law §627.8(6)

A *Richardson* inquiry by trial judge is necessary only when there is a discovery violation and an objection based on the alleged violation.

2. Criminal Law §627.7(3)

Prosecutor's failure to inform defense that State's investigator would testify that witness identified defendant's photograph, when investigator's deposition stated that witness had not identified any photographs, was not a discovery violation, and therefore

changed testimony neither constituted absolute legal necessity required for mistrial nor support for motion for *Richardson* inquiry.

3. Criminal Law §517.2(3)

Confession by defendant accused of murder, given to police 11 hours after full recitation of *Miranda* warning, was admissible at trial, where defendant indicated at time of confession that he was giving statement voluntarily, that he had been read his rights previously, he understood those rights and was willing to voluntarily deliver information.

4. Criminal Law §412.2(5)

There is no requirement that an accused be continually reminded of his rights once he has intelligently waived them.

5. Criminal Law §517.1(1)

A confession, in order to be admissible, must be the product of a rational intellect and free will.

6. Criminal Law §520(2)

Voluntariness of confession was not vitiated by implied suggestion by investigating officers that defendant would benefit if he confessed, since statements made to defendant did not overcome his will and produce confession.

7. Criminal Law §438(6)

Photographs are admissible where they assist medical examiner in explaining to jury nature and manner in which wounds were inflicted.

8. Criminal Law §438(6)

Allegedly gruesome and inflammatory photographs of victim's body, which were used to assist medical examiner in explaining external examination of victim, were admissible in murder trial, notwithstanding potential for swaying jury during sentencing phase, where photographs were not so shocking as to defeat value of their relevancy.

9. Jury §108

Exclusion of potential juror for cause was proper in murder trial, where juror's

attitude towards death penalty would have prevented her from rendering impartial decision.

10. Homicide §142(8)

Indictment charging premeditated murder permits state to proceed on either theory of premeditated murder or felony-murder.

11. Homicide §337

Defendant was not prejudiced in murder trial by not knowing whether State would proceed on theory of premeditated murder or felony-murder.

12. Homicide §341

Where jury found defendant guilty of both kidnapping and robbery, in addition to first-degree murder, failure to instruct on third-degree murder was at most harmless error. West's F.S.A. § 782.04(4).

13. Criminal Law §1172.9

Judge's statement in murder trial to the effect that sentencing decision required majority vote of jury was not prejudicial error, where body of jury instruction was correct, there was no objection or modification suggested, and jury was apparently not confused by partially inconsistent instruction.

14. Homicide §311

Instruction during sentencing phase of murder trial that sentence of death could not be imposed absent intent to kill or contemplation that life would be taken was not required, where facts were sufficient to support finding that defendant's involvement constituted required intent or contemplation.

15. Criminal Law §996(1.1)

Appeal for retribution in prosecutor's closing statement in murder trial was of minor impact and did not merit resentencing, notwithstanding the fact that jury vote was seven to five in favor of imposing death penalty and six to six vote would have precluded sentence of death.

16. Criminal Law §1171.1(1)

Supreme Court will automatically reverse for resentencing only when clear prosecutorial abuse exists.

Martha C. Warner of the Law Offices of Martha C. Warner, Stuart, for appellant.

Jim Smith, Atty. Gen., and Russell S. Bohn, Asst. Atty. Gen., West Palm Beach, for appellee.

ADKINS, Justice.

John Earl Bush was convicted of the first-degree murder of Frances Slater. The trial judge imposed the death penalty in accordance with the jury's advisory sentence recommendation. Bush appeals from the conviction and the sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. Having reviewed the record and considered the issues presented on appeal, we find no reversible error and affirm Bush's conviction and sentence.

The evidence at trial demonstrated the following events. At 3:00 a.m. on April 27, 1982, Frances Slater was abducted from the convenience store where she worked. Incident to the kidnapping, the store's cash register and floor safe were robbed of approximately \$134. Later that day, the victim's body was discovered thirteen miles from the store. She had a stab wound in her abdomen and had been shot once in the back of her head at close range.

At trial, a delivery person for the local newspaper testified that she was passing by the store between 2:30 and 3:00 a.m., and saw a car in the parking lot occupied by one black man.

Inside the store were two black men with another person. In a photo lineup, she identified Bush's car and identified Bush as being one of the men in the store.

Four taped statements given by Bush were played during the trial. These constitute the only known version of the events and are presented by Bush in the light most favorable to him. His statements are to the effect that he did not realize that his accomplices, Alfonso Cave, "Pig" Parker

and Terry Johnson, were planning to rob the convenience store, and that during and after the robbery he was under their domination. Bush states that after the robbery, they drove toward Indiantown, when his accomplices ordered him to stop. The victim was pushed out of the car and Bush avers that he intended to set her free. However, the accomplices decided that Slater might be able to identify them and they told Bush to dispose of her. Bush, not desiring to kill the victim, faked a blow at her with his knife and stabbed her superficially. Slater fell to the ground and an accomplice, Parker, shot her.

The jury returned a verdict of guilty on the charges of first-degree murder, robbery with a firearm, and kidnapping. Subsequent to the sentencing hearing, the jury recommended, in a 7-5 advisory sentence, that the death penalty be imposed. The trial judge, citing three aggravating factors and no mitigating factors, sentenced Bush to death.

CONVICTION

On appeal Bush raises ten points which will be addressed in order of their presentation. In the first point on appeal, Bush contends that the trial judge should have conducted an inquiry, as in *Richardson v. State*, 246 So.2d 771 (Fla.1971), or granted a mistrial because a state investigator's testimony contradicted his earlier deposition. This argument is without merit.

[1.2] A *Richardson* inquiry is necessary only when there is a discovery violation and an objection based on the alleged violation. *Richardson*, 246 So.2d at 774; *Lucas v. State*, 376 So.2d 1149, 1151 (Fla. 1979). In the instant case, investigator Forte stated in his deposition that Charlotte Grey, a clerk from a nearby convenience store which had been visited by Bush had not identified any photographs. At trial, Forte testified that witness Grey did identify Bush's photograph during the photo lineup. He explained that the inconsistency arose from defense counsel having asked two different questions. The prosecutor's failure to inform the defense of this

change of testimony is not a discovery violation and does not constitute the absolute legal necessity required for a mistrial. See *Dunn v. State*, 341 So.2d 806, 807 (Fla. 3d DCA 1977).

When testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider. This would serve to discredit the witness and should be favorable to the defense. Therefore, unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will not support a motion for a *Richardson* inquiry.

In his second point on appeal Bush argues that his confessions were inadmissible because they were procured through improper influence and without full benefit of the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). On the morning of May 4, 1982, Bush went to the Martin County Sheriff's Department to inquire about his car, which had been confiscated pursuant to a search warrant. He was fully advised of his rights, executed a waiver, then attempted to establish an alibi for the night of the murder.

The deputy sheriffs requested him to accompany them to West Palm Beach to substantiate the alibi. He was not under arrest and was free to refuse the request. Instead, Bush accompanied two officers to West Palm Beach to the house where Bush said they could meet a witness who would support his alibi.

When it became clear that the alibi witness would not appear, Bush told the officers that they did not have to wait any longer because the witness would not be able to help him. Bush then proceeded, in this second statement, to admit complicity in the crime. At the beginning of questioning, the officer asked Bush if he was giving the statement voluntarily, if he had been read his rights previously, if he understood those rights and was willing to voluntarily deliver the information. He responded affirmatively to each question.

[3.4] state statement *Miranda* though full rec that he to waive ment th minded ly waive F.2d 11: 425 U.S. (1976); 1st DCA

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Cite as 461 So.2d 936 (Fla. 1984)

[3.4] Bush claims that this second statement was made without benefit of a *Miranda* warning. We do not agree. Although it had been eleven hours since the full recitation of his rights, Bush stated that he was aware of his rights and desired to waive those rights. There is no requirement that an accused be continually reminded of his rights once he has intelligently waived them. *Biddy v. Diamond*, 516 F.2d 118, 122 (5th Cir.1975), cert. denied, 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 194 (1976); *Lucas v. State*, 335 So.2d 566 (Fla. 1st DCA 1976).

[5.6] Bush also contends that the voluntariness of his statements was vitiated by the implied suggestion by the investigating officers that he would benefit if he confessed. This Court has stated that although a police interrogator must neither abuse a suspect nor seek to obtain a statement by coercion or inducement, the interrogator's job is to gain as much information about the alleged crime as possible without violating the suspect's constitutional rights. *Stevens v. State*, 419 So.2d 1058, 1063 (Fla.1982). The confession must be the product of a rational intellect and free will. *Townshend v. Sain*, 372 U.S. 293, 307, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963). In addition, we have previously held that a confession is not rendered inadmissible because the police tell the accused that it would be easier on him if he told the truth. *Paramore v. State*, 229 So.2d 855, 858 (Fla. 1969).

On this point, the instant case is essentially similar to *La Rocca v. State*, 401 So.2d 866, 868 (Fla. 3d DCA 1981), where police statements that minimized the defendant's action were held not to be coercive. Under the totality of the circumstances, the statements made to Bush did not overcome his will and produce the confession. More likely, it was Bush's realization that he had failed to substantiate an alibi which caused him to confess and thereby admit a more favorable participation in the murder.

Bush's third point on appeal contests the admission of certain photographs which he

states were inflammatory and prejudicial. Exhibit fifteen, a blowup of the victim's bloody face, was taken at the morgue and admitted solely to identify Frances Slater. Exhibit twenty-one was a close-up of the gunshot wound to the victim's head.

[7.8] The test of admissibility of photographs in situations such as this is relevancy and not necessity. Photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted. *Welty v. State*, 402 So.2d 1159, 1163 (Fla.1981); *Bauldree v. State*, 284 So.2d 196, 197 (Fla.1973). In the instant case, exhibit twenty-one was used in order to assist the medical examiner in explaining the external examination of the victim. This exhibit was clearly admissible as an aid in illustrating to the jury what the examiner observed during his examination. Exhibit fifteen, though taken away from the scene, is treated no differently than exhibit twenty-one. We have repeatedly stated that:

[T]he current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative", or "whether photographed away from the scene," are routine issues basic to a determination of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence.

State v. Wright, 265 So.2d 361, 362 (Fla. 1972) (emphasis supplied). See *Henninger v. State*, 251 So.2d 862, 864 (Fla.1971); and *Meeks v. State*, 339 So.2d 186 (Fla.1976). Bush argues that exhibit fifteen was unduly prejudicial because it was gruesome and may have made a crucial difference in the jury's recommendation in this case. In *Williams v. State*, 228 So.2d 377 (Fla.1969), this Court noted that similarly gruesome photographs depicted a view which was "neither gory nor inflammatory beyond the

simple fact that no photograph of a dead body is pleasant." *Id.* at 379. The same rationale applies here, notwithstanding the potential for swaying the jury during the sentencing phase. We require only that the photograph not be so shocking in nature that it defeats the value of its relevancy. *Id.* These pictures were admissible.

[9] In point four, Bush argues that the trial court erred in excluding a potential juror on a challenge for cause. He cites *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), for the proposition that jury veniremen may be excluded only if they demonstrate an "unmistakeably clear" attitude toward the death penalty which would prevent them from making an impartial decision as to the defendant's guilt. See also *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

The following constitutes the pertinent portion of the statements of the juror excluded in this case:

Prosecutor: "Do you know of any reason why anything outside might come into it, other than what you hear here?"

Juror: "I don't know if I could take the responsibility of committing one to death. I just don't know if I could handle that."

Prosecutor: "Let me point out two things to you. First, your sentence is only advisory. The final decision, responsibility and burden lies with His Honor, the Judge. . . . Would that in any way cause you to change your opinion as to whether or not you could?"

Juror: "I just don't think I could handle the responsibility of condemning somebody. I think it's up to God."

Prosecutor: "And you feel like that would affect you even in the first stage, in determining the guilt or the innocence, knowing if you rendered a verdict of guilty of murder in the first degree that the man could be put to death, you feel that it could affect you?"

Juror: "I feel it would be a problem for me, myself, in my heart."

Defense Counsel: "I understand, of course, sympathy will enter into practically any case. . . . It's not anything that is unique to this case or any particular type of case. Do you understand that? How would you feel about it with that in mind?"

Juror: "I don't know. It would just be a very difficult thing to do."

Defense counsel: "Do you think you could do it, put sympathy out of your mind and base your verdict on the law and the evidence?"

Juror: "No, I don't think so."

We do not think that it was error to excuse the juror. This juror's attitude toward the death penalty is firmly grounded and would clearly prevent her from rendering an impartial decision.

[10, 11] In point five, Bush argues that our decision in *Knight v. State*, 338 So.2d 201 (Fla.1976), should be narrowed or distinguished because of the facts of this case. *Knight* held that an indictment charging premeditated murder would permit the state to proceed on either the theory of premeditated murder or felony murder. Bush claims that since he did not, in fact, commit the actual murder, *Knight* is inapplicable. We disagree. Whether or not Bush committed the actual murder is for the jury to determine. The jury could have decided that Bush was guilty of premeditated murder, or the jury could have convicted based upon the felony murder. In either case, *Knight* is applicable and Bush was not prejudiced by not knowing the specific theory upon which the state would proceed. See *O'Callaghan v. State*, 429 So.2d 691, 695 (Fla.1983); *State v. Pinder*, 375 So.2d 836, 839 (Fla.1979).

[12] Bush argues in point six that the trial court's rejection of a third-degree murder instruction was prejudicial error. We disagree. Third-degree murder is defined as "the unlawful killing of a human being, when perpetrated without any design to affect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than, . . . robbery

"I understand, of course, sympathy will enter into practically any case. . . . It's not anything that is unique to this case or any particular type of case. Do you understand that? How would you feel about it with that in mind?"

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six that the trial court's rejection of a third-degree murder instruction was prejudicial error. We disagree. Third-degree murder is defined as "the unlawful killing of a human being, when perpetrated without any design to affect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than, . . . robbery

... [or] kidnapping. . . ." Section 782.04(4), Florida Statutes (1981) (emphasis supplied). Since the jury found Bush guilty of both kidnapping and robbery, failure to instruct on third-degree murder is at most harmless. See also *State v. Abreau*, 363 So.2d 1063, 1064 (Fla.1978).

SENTENCING

In point seven Bush raises a variety of objections relative to the constitutionality of the Florida capital sentencing statute. Each of his contentions has been previously addressed and we do not deem it necessary to revisit them. See e.g., *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976).

[13] In Bush's eighth point on appeal he challenges the trial judge's "repeated" instructions to the jury that a sentencing decision requires a majority. We have held that such an instruction is erroneous. *Harich v. State*, 437 So.2d 1082, 1086 (Fla. 1983), cert. denied, — U.S. —, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984).

Here, although the jury charge contained some objectionable statements, the trial judge explicitly corrected himself by explaining: "if by six or more votes the jury determines that [Bush] should not be sentenced to death, your advisory sentence will be [imposition of a life sentence.]" (Emphasis supplied.) As in *Harich*, it affirmatively appears that the jury was not confused by the partial inconsistency of the instruction. Since the body of the instruction was correct and there was no objection or modification suggested, we find no prejudicial error.

[14] Bush argues in his ninth point on appeal that the trial judge should have instructed the jury during the sentencing phase that a sentence of death may not be imposed absent intent to kill or contemplation that life would be taken. In support, Bush cites *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which held that proof of intent to kill or contemplation of death is a necessary prerequisite to imposition of the death penalty. 458 U.S. at 794, 102 S.Ct. at 3375. Bush claims that failure to give this specif-

ic instruction to the jury may have resulted in a death sentence simply because the jurors believed Bush to be a "bad fellow."

We disagree with this contention on the facts of this case. Here, we do not have a mere passive aider and abettor as in *Enmund*, where the only participation by *Enmund* was as driver of the getaway car from what he supposed was only a robbery and not a murder. The facts of this case show that Bush was a major, active participant in the convenience store robbery and his direct actions contributed to the death of the victim. The degree of Bush's participation is sufficient to support a finding that his involvement constituted the intent or contemplation required by *Enmund*.

[15] Bush raises numerous issues in point ten, only one of which merits our discussion. He argues that during the sentencing phase the prosecutor made an appeal for sympathy and revenge for the family of the victim in the following statement to the jury:

"I ask you, don't consider the sympathy that Mr. and Mrs. Campbell have. Don't consider that when Mr. and Mrs. Campbell sit down to Thanksgiving dinner just three days from now that they are going to look across the table and they are going to look at Cathy and they are going to see Frances Julia Slater, the identical twin sister. If sympathy had any part of it, think of what they go through. And every time they sit down and look at her, this whole incident is going to come back. . . ."

Bush contends that this appeal for retribution was devastating inasmuch as the jury vote was 7-5 in favor of imposing the death penalty. We disagree. We have previously held that although "the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made. . . ." *Darden v. State*, 329 So.2d 287, 291 (Fla. 1976), cert. dismissed, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977).

In *Darden*, for example, the state continuously referred to the defendant as an

animal and played upon the necessity of restraining him permanently. We held that within the context of the argument, that reference to the defendant did not constitute prejudice requiring a new sentencing hearing. The instant case is not unlike *Darden*. We find that the above appeal to the jury's sympathies was of minor impact and does not merit re-sentencing. The statements are not a clear abuse, nor do they rise to the magnitude of a denial of fundamental fairness.

[16] *Teffeteller v. State*, 439 So.2d 840 (Fla.1983), is not inapposite. There, we stated:

Comments of counsel during the course of a trial are controllable in the discretion of the trial court, and an appellate court will not overturn the exercise of such discretion unless a clear abuse has been made to appear. *Paramore v. State*, 229 So.2d 855 (Fla.1969), vacated, 408 U.S. 935 [92 S.Ct. 2857, 33 L.Ed.2d 751] (1972).

Id. at 845. Only where clear prosecutorial abuse exists will we automatically reverse for resentencing. *Teffeteller*, 439 So.2d at 845. Here, we cannot say that the "line was clearly drawn too far" as in *Teffeteller*. *Id.*

Bush's convictions and sentences are affirmed.

It is so ordered.

BOYD, C.J., and ALDERMAN and SHAW, JJ., concur.

EHRlich, J., concurs in conviction and specially concurs with an opinion of the sentence, in which ALDERMAN and SHAW, JJ., concur.

OVERTON and McDONALD, JJ., concur in the conviction, but concur in result only of the sentence.

EHRlich, Justice, specially concurring.

I am in complete agreement with the majority, but I write separately to address a problem arising with increasing frequency in criminal cases, namely, prosecutorial misconduct in unfairly enflaming the jury's emotions in closing argument. On the facts of this case, it is clear that the prose-

cutor's description of the ongoing suffering of the victim's family did not fundamentally prejudice the defendant so as to require a new sentencing procedure. It is equally clear that the argument was irrelevant and improper.

Section 921.141, Florida Statutes, sets forth those factors which may be presented to a jury in support of the prosecution's request for a recommendation of death. The suffering of the survivors is not relevant to any of the factors listed. The purpose of the death penalty statute as now drafted is to insulate its application from emotionalism and caprice. This Court has long condemned prosecutorial arguments which appeal to emotion rather than to reason. *See, e.g., Teffeteller v. State*, 439 So.2d 840 (Fla.1983), *Singer v. State*, 109 So.2d 7 (Fla.1959); *Clinton v. State*, 53 Fla. 98, 43 So. 312 (1907). I can think of few arguments which are more calculated to arouse an intense emotional response in a jury than the graphic portrayal of the survivors' bereavement. I can imagine no set of facts on which this would be proper argument.

Unfortunately, in spite of the clear teaching of this and other courts that such argument is improper, prosecutors continue to indulge in it. This is contrary to the ethics of the profession generally and in violation of the duty, as state attorneys, to seek justice, not merely convictions. Zealous representation of society's interest does not require society's advocate to overstep the bounds of professional restraint. Our holding that, in this case, the improper argument does not require a new sentencing trial must not be seen as our condoning such impropriety. Continued flouting of ethical limitations of prosecutorial conduct can be corrected through professional discipline without burdening society at large or the criminal justice system with the cost of retrying the case.

ALDERMAN and SHAW, JJ., concur.



BUSH v. WAINWRIGHT

Cite as 505 So.2d 409 (Fla. 1987)

Fla. 409

Courtney J. VAN RIPER, Petitioner,
v.
STATE of Florida, Respondent.
No. 68457.

Supreme Court of Florida.

Feb. 19, 1987.

Prior report: 492 So.2d 1336.

Upon consideration of the Motion for Reconsideration filed in the above cause by petitioner,

IT IS ORDERED that said Motion be and the same is hereby denied.



John Earl BUSH, Petitioner,
v.
Louie L. WAINWRIGHT, Respondent.

John Earl BUSH, Appellant,
v.

STATE of Florida, Appellee.
Nos. 68617, 68619.

Supreme Court of Florida.

Feb. 26, 1987.

Rehearing Denied May 8, 1987.

Original proceeding in habeas corpus was combined with appeal from the Circuit Court, in and for Martin County, C. Pfeiffer Trowbridge, C.J., denying postconviction relief. The Supreme Court held that: (1) trial counsel's failure to use psychiatrist in compiling evidence of defendant's mental incompetency, failure to file number of pretrial suppression motions, and failure to object to certain aspects of proceedings at several stages of trial did not constitute ineffective assistance of counsel; (2) numerous psychological problems, such as learning disabilities, passive and dependent

personality, and possible diffuse organic brain damage did not, when taken together sufficiently raise valid question as to defendant's competency to stand trial; and (3) appellate counsel's failure to raise alleged unconstitutionality of lineup identification obtained in absence of defense counsel after arraignment did not constitute ineffective assistance of appellate counsel.

Affirmed, petition for writ of habeas corpus denied, previously granted stay of execution vacated.

Barkett J., concurred specially with opinion.

1. Criminal Law §998(3, 13)

Claims which were or could have been considered under direct appeal were barred from consideration on motion for postconviction relief.

2. Criminal Law §998(6)

Learning disabilities, passive and dependent personality, and possible diffuse organic brain damage did not, when taken together, sufficiently raise valid question as to postconviction petitioner's competency to stand trial.

3. Criminal Law §641.13(2, 6)

Trial counsel was not ineffective in failing to use psychiatrist in compiling evidence of defendant's mental incompetency, failing to file number of pretrial suppression motions, and failing to object to certain aspects of proceedings at several stages of trial; errors involved either strategies which would have been unsupported by record or actions pursued following sound strategies of defense. U.S.C.A. Const.Amend. 6.

4. Criminal Law §641.13(1)

Fact that trial strategies resulted in conviction augurs no ineffectiveness of counsel. U.S.C.A. Const.Amend. 6.

5. Criminal Law §641.13(7)

Appellate counsel's failure to raise alleged unconstitutionality of lineup identification obtained in absence of defense counsel after arraignment did not constitute

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ineffective assistance of counsel; identification served only to link defendant to crime, and link had already been established by defendant's admission. U.S.C.A. Const.Amend. 6.

Larry Helm Spalding, Capital Collateral Representative Mark E. Olive, Litigation Director and Billy H. Nolas, Staff Atty., Office of Capital Collateral Representative, Tallahassee, for petitioner/appellant.

Robert A. Butterworth, Atty. Gen., and Richard G. Bartmon, Asst. Atty. Gen., West Palm Beach, for respondent/appellee.

PER CURIAM.

John Earl Bush, a day before his scheduled execution on April 22, 1986, filed in the circuit court a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 and a motion for stay of execution, and in this Court filed a petition for a writ of habeas corpus and a stay of execution. The circuit court denied all relief without an evidentiary hearing. This Court granted a stay of execution on April 21 in order to allow a careful review and consideration of certain claims raised in Bush's appeal of the circuit court's denial of his 3.850 motion and his petition for habeas corpus. We have exercised our jurisdiction under article V, section 3(b)(1) and (9), Florida Constitution, and now find Bush entitled to no relief.

Bush was convicted in November, 1982 of first-degree murder, armed robbery, and kidnapping. A jury recommended the imposition of a sentence of death, and Bush was so sentenced. We affirmed the conviction and sentence in *Bush v. State*, 461 So.2d 936 (Fla.1984), *cert. denied*, — U.S. —, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986). On March 20, 1986, the governor signed a warrant authorizing Bush's execution, and Bush sought relief in the circuit court.

[1] We shall first examine the claims raised in the 3.850 motion. Of the seven claims raised therein, the last four either were or could have been considered on direct appeal and are therefore now barred from consideration. *Porter v. State*, 478 So.2d 33 (Fla.1985); *O'Callaghan v. State*,

461 So.2d 1354 (Fla.1984). We now examine 1) whether Bush was prejudiced by a "professionally inadequate" psychiatric evaluation which failed to disclose his alleged incompetency to stand trial, 2) whether Bush was in fact tried while incompetent, and 3) whether counsel at trial rendered ineffective assistance within the terms of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The first two issues raised above must fall together, as each lacks a crucial foundation in fact—any indication of Bush's incompetency to stand trial. Before trial below, the defense moved for the appointment of a psychiatric expert in order to evaluate the defendant's competency and the possible applicability of any mitigating factors. After consulting with the defense, the expert and counsel concluded that further examination would produce no useful information. We cannot find error in this tactical consensus reached by those parties most intimately involved with Bush and his defense. Since defense counsel was bound to seek out such expert testimony only if evidence existed calling into question Bush's sanity, *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *Christopher v. State*, 416 So.2d 450 (Fla. 1982), we cannot now find fault in counsel's decision as to the futility of pursuing the incompetency claim. As noted by the United States Supreme Court in *Ake*, "[a] defendant's mental condition is not necessarily at issue in every criminal proceeding." 105 S.Ct. at 1096.

[2] We find no error under the circumstances of this case. Absolutely no evidence existed at the time of trial that Bush lacked "sufficient present ability to consult with and aid his attorney in the preparation of a defense with a reasonable degree of understanding." *Ferguson v. State*, 417 So.2d 631, 634 (Fla.1982). A review of the original record reflects no evidence that Bush was incompetent to stand trial. Further, the long psychiatric history indicating incompetency pointed to in *Jones v. State*, 478 So.2d 346 (Fla.1985), and *Hill v. State*, 473 So.2d 1253 (Fla.1985), is absent in this case, and the report prepared by a newly

appointed psychiatric expert offers only weak support to Bush's claims. The numerous psychological problems now pointed out, such as learning disabilities, a passive and dependent personality, and possible "diffuse organic brain damage" do not, when taken together, sufficiently raise a valid question as to Bush's competency to stand trial. See *James v. State*, 489 So.2d 737 (Fla.) cert. denied, — U.S. —, 106 S.Ct. 3285, 91 L.Ed.2d 574 (1986). We therefore reject the first two claims.

[3, 4] In turning to the claim of ineffective assistance of trial counsel, we scrutinize the alleged inadequacies under the test set forth in *Strickland*. Bush alleges that counsel was ineffective in, *inter alia*, failing to use the psychiatrist in compiling evidence of the defendant's mental incompetency, failing to file a number of pre-trial suppression motions, and failing to object to certain aspects of the proceedings at several stages of the trial. The test is set forth as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

104 S.Ct. at 2064. Upon careful review, we determine that none of the alleged omissions in this case fall "outside the wide range of professionally competent assistance." *Id.* at 2066. The claimed errors of counsel involve either strategies which would have been unsupported by the record, such as the mental incompetency claim disposed of above, or actions pursued following sound strategies of the defense. The fact that these strategies resulted in a conviction augurs no ineffectiveness of counsel. *Songer v. State*, 419 So.2d 1044

(Fla.1982). In sum, we find no deficient performance prejudicing Bush, *Knight v. State*, 394 So.2d 997 (Fla.1981), and so reject this claim.

[5] Finally, we turn to the claim of ineffective assistance of appellate counsel raised in Bush's petition for a writ of habeas corpus. Prejudice resulted, it is argued, when appellate counsel failed to raise the alleged unconstitutionality of a lineup identification obtained in the absence of defense counsel after arraignment.

In *Knight*, we required a showing that the alleged deficiency, "considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." 394 So.2d at 1001. No such prejudice exists when the argument is considered in light of the case's facts.

Bush never contested his participation in the crime, only the extent and nature of his involvement. Because the identification served only to link him to the crime, and this link had already been established by his admission, suppression of the lineup identification would not have materially aided his defense. We can perceive no ineffectiveness in appellate counsel's declining to dilute any more valid issues upon appeal by advocating this tangential point which, even if accepted, would not change the result in the case.

Finding no basis for relief in Bush's motions for post-conviction relief, we affirm the trial court's denial of his 3.850 motion to vacate the judgment and sentences and deny the petition for writ of habeas corpus. The previously granted stay of execution is vacated.

It is so ordered.

MCDONALD, C.J., OVERTON, EHRLICH and SHAW, JJ., and ADKINS, J. (Ret.), concur.

BARKETT, J., concurs specially with an opinion.

BARKETT, Justice, concurring specially.

I concur in the majority's denial of habeas corpus relief.

I concur in result only in the majority's affirmance of the trial court's summary denial of defendant's motion under Rule 3.850. While I agree that most of the issues raised were not cognizable on a motion for post-conviction relief, I do not agree with the majority's treatment of Bush's claims of ineffective assistance of counsel and incompetency at the time of trial.

There are only three possible dispositions available to a trial judge in ruling on a 3.850 motion: (1) The judge may deny the motion because it is insufficient as a matter of law to support the defendant's claims; (2) The judge may deny the motion if the claims are conclusively refuted by the record, but must attach those portions of the record which conclusively refute the allegations; (3) The judge must grant an evidentiary hearing to resolve any legitimate factual claims that are not conclusively refuted by the record.

In this case, I do not believe the defendant has met his burden of alleging facts which would support a claim for relief. Bush's allegations of ineffective assistance of counsel do not meet the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), nor are there sufficient allegations to support the claim of incompetency. At best, Bush alleges that an expert would testify that based upon a current evaluation "Bush's borderline scores in regard to intellectual functioning as well as his apparent learning disability would indicate a possibility of incompetence during the time of his trial." This falls short, in my view, of adequately raising the factual question of Bush's incompetency to stand trial, and therefore the motion was correctly denied as a matter of law. See *James v. State*, 489 So.2d 737 (Fla.), cert. denied, — U.S. —, 106 S.Ct. 3285, 91 L.Ed.2d 574 (1986).

My reasons for departing from the majority's analysis are threefold. By making "findings of fact" from a "review of the record," the majority suggests that sufficient factual allegations were contained in the motion and that in the face of ade-

quately pled factual allegations this Court should "suspend" the requirements of Rule 3.850 to either append the pertinent portions of the record or grant an evidentiary hearing.

First, as I previously stated, I do not think this case involves that portion of the rule which pertains to the necessity for factual findings either from the record or from an evidentiary hearing.

Second, if this were a case which presented any legitimate factual issues, they should be resolved by the trial court. I cannot fault reviewing the record as an extra precaution when the motion does not require it. However, when the motion does require looking at the record, appellate review should not serve as a substitute for the trial court's initial review. I do not believe that as a reviewing court, we should arrogate the function of fact-finding.

Lastly, in reviewing a record a court cannot reach conclusions unsupported by that record. In this instance, the majority did so. To cite but one example, the majority finds that:

After consulting with the defense, the expert and counsel concluded that further examination would produce no useful information.

There was no evidentiary hearing in this case. Neither trial counsel nor the psychiatric expert consulted by defense counsel presented any testimony. I am at a loss as to how the majority could possibly have reached this factual conclusion.

Because I believe Bush's allegations to be legally insufficient, the trial judge correctly denied Bush's motion for post-conviction relief. However, when the allegations are legally sufficient to create a factual dispute, I believe trial courts should resolve such disputes either from the record or from an evidentiary hearing. Reviewing courts should then review trial court decisions under the clearly established standards of appellate review.



John Earl BUSH, Petitioner,

v.

Richard L. DUGGER, etc., Respondent.

No. 76577.

Supreme Court of Florida.

March 28, 1991.

Rehearing Denied June 12, 1991.

Following affirmance of first-degree murder conviction and death sentence, 461 So.2d 936, defendant petitioned for writ of habeas corpus. The Supreme Court held that prosecutor's comment during penalty phase about how family would miss victim during upcoming holiday was improper but did not warrant relief.

Petition denied.

1. Habeas Corpus ¶296, 505

Claims of error with respect to victim impact statements during penalty phase of murder prosecution are generally not cognizable in habeas corpus proceeding, but such a claim would be considered where Supreme Court did not have benefit of United States Supreme Court decisions on the issue when it considered the case on direct appeal.

2. Criminal Law ¶723(1)

Habeas Corpus ¶497

Prosecutor's comment during penalty phase of first-degree murder prosecution, about how victim's family would miss her during upcoming holiday, was improper victim impact statement, but did not warrant habeas corpus relief since it was only a single comment which did not impermissibly emphasize victim's personal qualities or the family's opinions and characterizations of the crime. U.S.C.A. Const.Amend. 8.

3. Habeas Corpus ¶296

Habeas corpus petitioner's claim that aggravating factor was improperly applied

significant mitigator); *Rembert v. State*, 445 So.2d 337 (Fla.1984) (one aggravator, considerable mitigating evidence).

[11] The remaining points raised by Young are without merit. Contrary to his contention, trial courts may rely on presentence investigation (PSI) reports. *Engle v. State*, 438 So.2d 803 (Fla.1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984). The court used evidence of Young's prior adult convictions in sentencing him on the burglary conviction, not the first-degree murder conviction. Moreover, the judge stated that he would not rely on any victim impact evidence contained in the PSI or on Young's juvenile record. The record indicates that the court did, in fact, ignore that material.

[12] Young claims that the court improperly excused seventeen death-scrupled prospective jurors, but identifies only three of those persons. He also argues that the court improperly refused his challenge against a woman he claims would automatically vote for death. The competency of a juror is a mixed question of law and fact to be decided within a trial court's discretion. *Davis v. State*, 461 So.2d 67 (Fla.1984), *cert. denied*, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). "Manifest error must be shown before a trial court's ruling will be disturbed on appeal." *Id.* at 70. Our review of the record discloses no such error.

Finally, Young's challenges to the constitutionality and validity of Florida's death penalty statute have been rejected previously. *E.g.*, *Van Poyck v. State*, 564 So.2d 1066 (Fla.1990).

There being no reversible error, we affirm Young's conviction of first-degree murder and sentence of death.

It is so ordered.

SHAW, C.J., and OVERTON,
McDONALD, GRIMES and KOGAN, JJ.,
concur.

BARKETT, J., concurs in result only.



in imposing death sentence was procedurally barred where the claim was raised on direct appeal.

4. Habeas Corpus — 275

Habeas corpus petitioner's claim of instructional error was procedurally barred where no objection was made to instructions at trial.

Larry Helm Spalding, Capital Collateral Representative, Billy H. Nolas, Chief Asst. CCR, and Gail Anderson, Staff Atty., Office of the Capital Collateral Representative, Tallahassee, for petitioner.

Robert A. Butterworth, Atty. Gen., and Celia A. Terenzio, Asst. Atty. Gen., West Palm Beach, for respondent.

PER CURIAM.

John Earl Bush, who is sentenced to death, petitions this Court for a writ of habeas corpus. Bush was convicted of the 1982 first-degree murder of Frances Slater. We have affirmed that conviction and the sentence of death in *Bush v. State*, 461 So.2d 936 (Fla.1984), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986), and have subsequently denied an appeal from a rule 3.850¹ motion and a first petition for a writ of habeas corpus. *Bush v. Wainwright*, 505 So.2d 409 (Fla.), *cert. denied*, 484 U.S. 873, 108 S.Ct. 209, 98 L.Ed.2d 160 (1987). We have jurisdiction under article V, sections 3(b)(1) and (9) of the Florida Constitution.

[1] Bush raised four claims in this petition. First, he argues that the prosecutor committed reversible error in the closing argument during the penalty phase and that he is entitled to relief under the United States Supreme Court's decisions in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). Bush's attorney

objected to the argument and raised the issue on appeal. In that decision this Court stated:

[Bush] argues that during the sentencing phase the prosecutor made an appeal for sympathy and revenge for the family of the victim in the following statement to the jury:

"I ask you, don't consider the sympathy that Mr. and Mrs. Campbell have. Don't consider that when Mr. and Mrs. Campbell sit down to Thanksgiving dinner just three days from now that they are going to look across the table and they are going to look at Cathy and they are going to see Frances Julia Slater, the identical twin sister. If sympathy had any part of it, think of what they go through. And every time they sit down and look at her, this whole incident is going to come back . . ."

Bush contends that this appeal for retribution was devastating inasmuch as the jury vote was 7-5 in favor of imposing the death penalty. We disagree. We have previously held that although "the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made. . . ." *Darden v. State*, 329 So.2d 287, 291 (Fla.1976), *cert. dismissed*, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977).

. . . . We find that the above appeal to the jury's sympathies was of minor impact and does not merit resentencing. The statements are not a clear abuse, nor do they rise to the magnitude of a denial of fundamental fairness.

Bush, 461 So.2d at 941-42. Because we did not have the benefit of *Booth* and *Gathers* when we first considered this case, we have decided to reconsider this claim under those decisions.²

(Fla.1990); *Jackson v. Dugger*, 547 So.2d 1197, 1199 n. 2 (Fla.1989). However, in *Jackson* this Court considered the *Booth* claim during habeas proceedings because this Court had specifically approved the introduction of the testimony on direct appeal. Because this case comes to us in

In *Booth* the Supreme Court held that Maryland's requirement that a "victim impact statement" be considered during sentencing violated the eighth amendment. The "victim impact statement" in that case contained extensive information about "the victims' outstanding personal qualities" and "the emotional and personal problems the family members have faced as a result of the crimes." *Booth*, 482 U.S. at 499, 107 S.Ct. at 2531. The victim impact statement also presented information concerning "the family members' opinions and characterizations of the crimes" including the son's statement that "his parents were 'butchered like animals.'" *Id.* at 508, 107 S.Ct. at 2535. The Supreme Court concluded that "the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Id.* Thus, such information could result in a jury's imposing the death penalty in an arbitrary and capricious manner. *Id.* at 502-03, 107 S.Ct. at 2532-33.

The Supreme Court again considered *Booth* error in *Gathers*. During the sentencing phase closing arguments in *Gathers* the prosecutor read extensive portions of a printed prayer as well as emphasizing other religious objects and a voter registration card all found in the victim's possession. *Gathers*, 490 U.S. at 808-10, 109 S.Ct. at 2209-10. The Court held that this argument violated *Booth* because it focused the jury's attention on the victim's personal qualities and characteristics, factors about which the defendant was unaware. *Id.*, 490 U.S. at 811, 109 S.Ct. at 2210-11. The information was not relevant to the circumstances of the crime nor to the defendant's moral culpability. *Id.* at 811-12, 109 S.Ct. at 2210-11.

a similar procedural posture to *Jackson*, we have chosen to discuss this claim on the merits. Cf. *Parker v. Dugger*, 550 So.2d 459 (Fla.1989) (*Booth* claims procedurally barred because the defendant had not objected to the use of the victim impact evidence at trial). However, we refuse to consider claims of *Booth* error that occurred during jury selection, when the prosecutor was asking prospective jurors if they knew members of the victim's family, because the defendant did not object.

[2] In comparison to the extensive victim impact evidence presented to the juries in *Booth* and *Gathers*, in this case the prosecutor made only one comment about how the family would miss the victim during an upcoming holiday. The single comment in this case cannot compare in impact to that created by the victim impact statement in *Booth* or the use of the prayer in *Gathers*. The comment did not impermissibly emphasize the victim's personal qualities or the family's opinions and characterizations of the crime. The comment was only a single statement about the family's loss, a loss that juries are generally aware that families feel when a family member is murdered. Although the comment was improper, we can say beyond a reasonable doubt that the jury's recommendation would have been no different had it not heard this statement. See *Jackson v. Dugger*, 547 So.2d 1197 (Fla.1989).³

Bush's next claim is that this Court should vacate his death sentence and impose a sentence of life imprisonment because the sentencing judge failed to issue a contemporaneous written sentencing order with his oral announcement of sentence.⁴ This claim is procedurally barred. *Parker v. Dugger*, 550 So.2d 459 (Fla.1989). We also note that Bush's sentencing preceded our decision in *Grossman v. State*, 525 So.2d 833 (Fla.1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989), and comported with the sentencing requirements we set out in *Stewart v. State*, 549 So.2d 171 (Fla.1989), *cert. denied*, — U.S. —, 110 S.Ct. 3294, 111 L.Ed.2d 802 (1990).

[3] Bush next argues that the cold, calculated, and premeditated aggravating factor was improperly applied. This claim

3. The United States District Court for the Middle District of Florida has similarly rejected Bush's claims of *Booth* error. *Bush v. Dugger*, Case No. 88-22-CIV-FtM-13 (M.D.Fla. Aug. 8, 1989).

4. Pursuant to the directions of this Court, the judge subsequently incorporated his oral findings into a written sentencing order.

is procedurally barred because Bush raised the claim on direct appeal. Bush's reliance on *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), is misplaced. *Brown v. State*, 565 So.2d 304 (Fla.), *cert. denied*, — U.S. —, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990).

[4] Finally, Bush claims that he is entitled to relief because the penalty phase jury instructions unconstitutionally shifted the burden of proof to him to prove death was not the appropriate penalty. This claim is procedurally barred because Bush did not object to the instructions at trial. We also note that the instructions were not erroneous. *Bertolotti v. Dugger*, 883 F.2d 1503 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990).

We deny the petition for habeas corpus. It is so ordered.

SHAW, C.J., and OVERTON,
McDONALD, BARKETT, GRIMES,
KOGAN and HARDING, JJ., concur.



STATE of Florida, Petitioner,

v.

Michael DONALDSON, Respondent.

No. 76129.

Supreme Court of Florida.

May 9, 1991.

Defendant petitioned for writ of certiorari from determination of the Circuit Court, Palm Beach County, James T. Carlisle, J., which affirmed defendant's driving under the influence conviction in County Court. The District Court of Appeal, 561 So.2d 648, granted writ, and question was certified. The Supreme Court, McDonald, J., held that breathalyzer test results were

not admissible where no testimony on reliability or integrity of machine was offered.

Question answered.

1. Automobiles ⇐422

In order for breathalyzer test results to be admissible, there must be probative evidence that test was performed substantially in accordance with methods approved by Department of Health and Rehabilitative Services, and with type of machine approved by Department, by person trained and qualified to conduct it, and that machine itself has been calibrated, tested, and inspected in accordance with Department regulations to assure its accuracy; evidence of reliability of machine can be presented by person conducting its testing and inspection or, if records of use and periodic testing are kept in regular course of business, by production of such records. West's F.S.A. § 316.193.

2. Automobiles ⇐424

Minor deviations in compliance with regulations, such as storage location or absolute timeliness of periodic inspection, will not prohibit breathalyzer test results from being presented, provided that there is evidence from which fact finder can conclude that machine itself remained accurate. West's F.S.A. § 316.1934(3); F.S.1987, § 316.1932(1)(b)1.

3. Automobiles ⇐422, 423

After State presents breathalyzer test results, defendant may, in any proceeding, attack reliability of testing procedures and qualifications of operator; defendant also may question compliance with departmental regulations and effect on machine's integrity of failing to follow them strictly.

4. Automobiles ⇐424

Breathalyzer test results were not admissible where State presented no testimony on reliability or integrity of machine used.

David H. Blutworth, State Atty. and Robert S. Jaegers, Asst. State Atty., West Palm Beach, for petitioner.

FILED
12
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION 31 '89

JOHN EARL BUSH,

Petitioner,

v.

Case No. 88-22-CIV-FtM-13

RICHARD L. DUGGER,
Florida Department of
Corrections

Respondent.

O R D E R

On the morning of April 27, 1982, four men abducted Francis Slater from a convenience store where she worked. Her body was found later that same day, some thirteen miles away. It evinced a stab wound in the abdomen and a bullet hole in the back of her head. She had been robbed of \$134.00. John Earl Bush was tried for the crimes in November of 1982 and was convicted, by jury, of first degree murder, armed robbery and kidnapping. By a vote of 7-5, the jury recommended that Bush receive the death penalty for his role in the murder. Said sentence was imposed. Bush appealed his conviction and sentence to the Florida Supreme Court. See Bush v. State, 461 So.2d 936 (Fla. 1984). The appeal raised ten claims:

(1) Bush claimed an investigator's testimony contradicted an earlier deposition and therefore he, Bush, was entitled to a mistrial or at least a hearing pursuant to Richardson v. State, 246 So.2d 1149, 1151 (Fla. 1979). The trial judge granted neither and Bush claimed the refusal was in error. The Florida Supreme Court

rejected this claim since a change of testimony is not a discovery violation meriting a Richardson hearing; the change of testimony did not result in an absolute legal necessity for a mistrial; the discrepancy may have arisen from defense counsel's use of two different questions and testimonial discrepancies are to be resolved by the jury and, when offered by witnesses for the prosecution, inure to the benefit of the defendant.

(2) Bush claimed his four statements to the police were not voluntary but were procured by improper influence and without the benefit of a proper warning pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Specifically, he alleged officers coerced his confession by minimizing his role in the crime. The court rejected this claim since a confession is not rendered inadmissible by the interrogator's assurance that it would be easier on the accused if he told the truth, see Paratore v. State, 229 So.2d 855, 858 (Fla. 1969) and since police statements minimizing Bush's actions were not unconstitutionally coercive. See e.g., La Rocca v. State, 401 So.2d 866, 868 (Fla. 1st DCA 1981).

(3) Bush claimed the trial judge erred by admitting into evidence gruesome photographs of the victim's body which may have prejudiced Bush's effort to get a fair trial. The court rejected this claim since relevant photographs are admissible. See State v. Wright, 265 So.2d 361, 362 (Fla. 1972).

(4) Bush claimed the trial judge erred in excluding a potential juror on a challenge for cause. The court rejected this claim

since a jury venireman may be excluded when he demonstrates an "unmistakably clear" attitude toward the death penalty which would prevent him from making an impartial decision as to the defendant's guilt. See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). When asked by defense counsel, "Do you think you could do it [impose the death penalty], put sympathy out of your mind and base your verdict on the law and the evidence?," the juror responded, "No, I don't think so."

(5) Bush claimed he was prejudiced by not knowing whether the state would proceed against him on a theory of actual murder or felony murder. The court rejected this claim based on Knight v. State, 338 So.2d 201 (Fla. 1976) wherein it held that an indictment charging premeditated murder would permit the state to proceed on either theory.

(6) Bush claimed the trial judge erred in not giving an instruction for third-degree murder. The court rejected this claim since third-degree murder is defined as "the unlawful killing of a human being, when perpetrated without any design to affect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than,...robbery...[or]...kidnapping-...." Section 782.04(4), Florida Statutes (1981) (emphasis added).

(7) Bush claimed the Florida capital sentencing statute is unconstitutional. The court rejected this claim based on Proffitt v. Florida, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976).

(8) Bush claimed he was prejudiced by repeated instructions to the jury to the effect that a sentencing decision requires a majority. The court rejected this claim since the trial judge expressly corrected himself by explaining: "if by six or more votes the jury determines that [Bush] should not be sentenced to death, your advisory sentence will be [imposition of a life sentence]." Bush v. State, 461 So.2d at 941.

(9) Bush claimed the trial judge erred in not instructing the jury during the sentencing phase that death may not be imposed absent an intent to kill or contemplation that life would be taken. The court rejected this claim since the facts showed Bush to be a "major, active participant...[whose] direct actions contributed to the death of the victim" and were enough to establish the requisite intent. Id. at 941.¹

(10) Bush claimed he was prejudiced by prosecutorial appeal to sympathy for the victim's family. The court denied this claim since the statements made were not clearly abusive, nor did they arise to a denial of fundamental fairness.

Accordingly, the Florida Supreme Court affirmed Bush's conviction and sentence on November 29, 1984--some two years after their imposition. Bush moved for rehearing. Rehearing was denied January 31, 1985. Bush v. State, 461 So.2d 936 (Fla. 1985). Bush filed a Petition for Writ of Certiorari with the United States

¹The Court notes that the finding of "intent" necessary to sustain imposition of the death penalty can be made by the trial judge or an appellate court as well as by a jury. See Cabana v. Bullock, 106 S.Ct. 689 (1986).

Supreme Court; it too was denied. Bush v. Florida, 106 S.Ct. 1237 (1986). Florida's Governor signed Bush's first death warrant on March 20, 1986. Execution was scheduled for April 22 of the same year. On April 21, Bush moved for a Stay of Execution and filed a Motion to Vacate his Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850. Both motions were denied by Chief Judge C. Pfeiffer Trowbridge, Nineteenth Judicial Circuit in and for Martin County, Florida. Mr. Bush filed an immediate Petition for Writ of Habeas Corpus in the Florida Supreme Court appealing the denial of his Motion to Vacate Judgment and Sentence. The Florida Supreme Court granted a stay of execution to consider Bush's claims. He raised seven:

(1) Bush claimed he received ineffective assistance from his appointed counsel in violation of the standards which the Supreme Court enunciated in Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Upon consideration, the court rejected this claim since none of the alleged omissions fell outside the wide range of assistance deemed professionally competent.

(2) Bush claimed he was prejudiced by a professionally inadequate psychiatric evaluation which failed to disclose his alleged incompetency to stand trial. The court rejected this claim finding no evidence that Bush was incompetent to stand trial.

(3) Bush claimed he was incompetent to stand trial. The court rejected this claim finding no evidence to support it.

(4-7) The court rejected without enumerating the remaining

four claims since they could have been raised on direct appeal and were therefore procedurally barred from collateral attack.²

Accordingly, the Florida Supreme Court denied the petition on February 26, 1987. Bush filed for rehearing and rehearing was denied, May 8, 1987. Bush filed another Petition for Certiorari with the United States Supreme Court; it too was denied, October 5, 1987. Bush v. Florida, 108 S.Ct. 209 (1987).

On January 8, 1988, Florida Governor Bob Martinez signed the petitioner's second death warrant. The execution was scheduled for February 3, 1988. On February 1, Bush filed the instant action: a 17 claim, 245 page federal habeas corpus petition claiming that his constitutional rights had been violated before trial, during trial, at sentencing and on appeal. Specifically, the petition reasserted the arguments asserted before the state courts and argued, inter alia, that Mr. Bush was a "victim," that the lawyers with which he was provided were ineffective, that his prosecutors set him up, his police interrogatories coerced his confession, his jury was confused about its role and his judge allowed illegal evidence to be admitted against him. This Court stayed the execution to allow itself time to consider Mr. Bush's claims. Ultimately, the Court granted Bush a hearing to consider his claim that he was deprived

²Those claims were (a) that the state misled the jury by the presentation of false evidence and argument; (b) that the prosecutor's closing argument at the penalty phase was inflammatory and highly prejudicial; (c) that the penalty phase jury instructions diluted the jury's sense of responsibility; and (d) that Florida imposes the death penalty in an unconstitutional, racially-biased manner. See Initial Brief of the Appellant, State Court Collateral Proceedings, at i - iii.

of effective assistance of counsel at the sentencing phase of his trial. The Court now renders its decision as to each of the allegations:

While the petitioner has raised a plethora of issues before this Court, his petition is based primarily on his claim that he was deprived of effective assistance of counsel at all stages of his prosecution and sentencing. It is therefore necessary to set out the events which led up to his sentencing (paying particular attention to the assistance provided by trial counsel) and to set out a standard against which the Court is to determine whether the assistance rendered was constitutionally defective. The two will be done in reverse order.

A. Ineffective Assistance of Counsel

To prove that his legal representation was so defective as to require a reversal of his conviction or his sentence of death, petitioner must do two things: he must prove that his lawyer's performance was deficient--that is, that performance fell below an objective standard of reasonableness--and he must show that the deficient performance prejudiced the outcome or the defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1983). Counsel's standard is that of "reasonably effective assistance within the wide range of competence demanded of attorneys in criminal cases." Id. at 687 and 690. See also Thomas v. Wainwright, 787 F.2d 1447, 1449 (11th Cir. 1986).

Judicial scrutiny of a counsel's performance must be highly deferential. The court's every effort should be made to eliminate

the distorting effects of hindsight, to reconstruct the circumstances of the challenged conduct, and to evaluate that conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. The court must indulge a strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. See also, Darden v. Wainwright, 91 L.Ed. 2d 144, 160 (1986).

These standards require no special amplification in order to define counsel's duty to investigate. Strickland, supra at 690. A criminal attorney has the duty to investigate, but the scope of investigation is governed by a reasonableness standard. Mitchell v. Kemp, 762 F.2d 886, 888 (11th Cir. 1985) cert. denied 107 S.Ct. 3248, 97 L.Ed. 2d 774 (1987). The duty is to make reasonable investigations or to make reasonable decisions which render particular investigations unnecessary. Id. See also Strickland, supra at 691. The reasonableness of a counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Id. at 691. While counsel may not refuse to search the defendant's background before sentencing, see e.g., Thomas, supra, counsel has no absolute duty to present mitigating character evidence at the sentencing hearing and the decision not to do so may be a sound strategic one. Stanley v. Zant, 697 F.2d

955, 961-62 (11th Cir. 1983) cited for support in Mitchell, supra at 890 (11th Cir. 1985).³

However, even if petitioner's counsel made a professionally unreasonable error, neither the conviction nor the sentence will be overturned if the error had no effect on the judgment. Strickland, supra at 691-92. The claim that an attorney's performance was deficient is subject to the general requirement that the defendant affirmatively prove prejudice. Id. at 693. A defendant need not show that his counsel's deficiencies "more likely than not" altered the outcome in the case. Id. But it is not enough for him to show that the errors had some conceivable effect on the

³In Mitchell, the 11th Circuit held an attorney was not in error for failing to present mitigating background evidence at the capital sentencing hearing where (1) the attorney spoke with the defendant about his background, (2) the defendant discouraged the attorney from looking into his background, (3) the attorney contacted the defendant's father and found him unwilling to offer any assistance, and (4) the attorney believed the possibility of finding anything in the defendant's background that would help the defense was nil. Mitchell, supra at 889. The Mitchell court found it significant, however, that the attorney did not just blindly follow the defendant's direction, but made an independent evaluation of the usefulness of character witnesses by an in-depth conversation with the defendant. Id. at 890.

Likewise, in Burger v. Kemp, 97 L.Ed. 2d 638 (1987) the U.S. Supreme Court held that an attorney's failure to investigate the accused's background more thoroughly and to present in mitigation the facts of the accused's unhappy and unstable childhood, did not constitute a denial of the accused's Sixth Amendment right to effective assistance of counsel where the attorney's actions were supported by reasonable professional judgment. That judgment was supported by the counsel's decision that evidence of his client's background would not have minimized the risk of his receiving the death penalty and, in all likelihood, would have opened doors for the prosecution that, from the defendant's perspective, were best left unopened. Id. at 653-58 (evidence of the background would have undermined the defense theory that the defendant was under the dominion of another defendant on the night of the murder). Id. at 656-57.

outcome of the proceeding. Id. He must show that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. Reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694.

If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, supra at 697.

B. Facts Relevant to the Defense

In October of 1974, John Earl Bush was sentenced to 30 years in prison for the rape, robbery and kidnapping of a nineteen year old woman. In his trial for those offenses, Bush was represented by an attorney named "Schopp" who was originally appointed to represent him in his trial for the murder, robbery and kidnapping of Miss Slater. Mr. Bush objected to Schopp's representation in the Slater case, and attorney Lee Muschott volunteered for the job upon Judge Trowbridge's request that he do so. (H. at 350-51).⁴ At that time, Muschott had been an attorney for eight years (H. at 292) and had experience with capital cases (H. at 350). From the start, he analyzed Bush's case as one in which the prosecutor's would seek a penalty of death. (H. at 352).

⁴Throughout this opinion, "H. at ___" is a reference to the page number of the transcript of the Evidentiary Hearing held by this Court on January 4-6, 1989. "Petition" refers to Mr. Bush's Petition for Federal Habeas Corpus relief. "SR" refers to the state's initial Response to the Petition. "R" refers to the trial record. Other references are made more explicitly in the text.

Mr. Muschott met with Schopp and learned of the circumstances surrounding Bush's prior conviction for rape. (H. at 298). Muschott characterized them as "horrendous." He also reviewed the court file (H. at 296-98) and learned that the rape victim was left traumatized and in need of psychiatric care for several years after the incident. (H. at 365). The similarity between crimes was striking: both involved the kidnapping, robbery and assault of young, white females with the assistance of accomplices. (H. at 364-66). And in both instances, there was evidence to implicate the leadership of one John Earl Bush. (Id.) Those "horrendous" circumstances were also known to prosecutors Stone and Midelas; and Muschott believed that if the facts relating to the earlier kidnapping, robbery and rape, were made known, during the sentencing phase, to a jury that had just convicted Bush of kidnapping, robbery and murder, Bush's chances of avoiding the death penalty would be nil. (H. at 364-66). A key element of Muschott's strategy was to prevent Stone and Midelas from getting before the jury any of the specific details of Bush's prior offenses. (H. at 364-65).

In addition to meeting with Schopp, Muschott met with W.C. Bush, the petitioner's brother, and spoke with him several times prior to trial regarding the petitioner's background. (H. at 299-300). Muschott told W.C. Bush that other family members could contact him (Muschott) if they wished. (H. at 299-300). Muschott also met with W.C. Bush, Sr., petitioner's father (H. at 302), with Georganna Williams, petitioner's girlfriend (H. at 312), and with

Moses Mitchell, petitioner's brother-in-law (H. at 310) to discuss various aspects of the case and of Bush's background. Mr. Muschott specifically discussed the possibility of mitigating circumstances with Bush's brother and his father and asked them both if they had anything to offer. (H. at 366). They did not and, according to Muschott, indicated that they did not wish to testify on Bush's behalf (i.e., at the sentencing phase). (H. at 367). Bush himself told Muschott that he did not want his father to testify. (H. at 367). Throughout the course of these various meetings, and during the more than 20 meetings Muschott had with Bush himself, Muschott became familiar with Bush's familial and educational history (H. at 300) and learned of Bush's problems in prison, including his repeated rapes and his subjection to physical abuse. (H. at 343-44, 396).

At a status conference, Muschott requested and received the appointment of a Dr. Tingle to help him evaluate the possibility of developing defenses or mitigating factors based on Mr. Bush's psychiatric profile. Muschott requested Dr. Tingle because of his defense-oriented reputation. (H. at 322, 377-78). In Muschott's words, Tingle was more "liberal, if you will, in terms of the defense position...." (H. at 378). The court also appointed an experienced investigator (Hershel Thompson) with whom Muschott had had a prior, satisfactory working relationship. (H. at 352). Thompson met with Bush on a number of occasions and reported back to Muschott with whatever information he had obtained. (H. at 354).

Prior to Muschott's appointment as Bush's counsel, Bush gave four statements to the police, the fourth of which was against the advice of then appointed attorney Schopp. (R. at 811-12).⁵ In the first, Bush denied any involvement in the Slater abduction, but he said that, on the night of the murder, he had given a ride to three men whom he did not know. (R. 690-91; SR at 15). He also claimed he had an alibi. (R. at 707-08, 728-29). When officers took Bush to West Palm Beach to verify this alibi, Bush withdrew the defense and volunteered a second statement in which he admitted that he, Pig Parker, Alphonso Cave and Terry Johnson had gone to Ft. Pierce with the intention of committing robbery and that the four had abducted, robbed and murdered Miss Slater. (R. 749-55; SR at 16). Bush denied that he had stabbed or shot the victim; he denied that he knew who's idea it was to kill her, and he denied that he had seen anyone with a knife. Id.

Bush gave his third statement later that same evening after he and the officers had returned from West Palm Beach. Therein he admitted driving the get-away vehicle, owning the murder weapon and disposing of it the next day of his own accord. (R. at 761-81; SR at 17-18). He also admitted that he had received part of the robbery proceeds. Id. Although Bush stated that he had been drinking on the night of the murder, he indicated that he had not been drinking as much as the others and that he knew what he was doing at all times. Id. Bush was subsequently arrested and jailed. On or about May 7, he sent a note from jail indicating that he wanted

⁵The statements were given between May 4th and 7th, 1982.

to see a sheriff in order to "get it straight." (R. at 797; SR at 18). Sheriff Holt advised Bush that he had to contact his attorney before he could make any statement. Bush responded, "[n]otify him, I want to tell my side." Id. Attorney Schopp advised Bush not to make any further statements but Bush insisted. (R. at 798-801; SR at 18-19). In his fourth statement, Bush admitted that he was the one who stabbed Francis Slater but said that he had "faked" it in an effort to get his cohorts to leave her alone. (R. at 820-22; SR at 19). Although Muschott objected to the admission of each of the four statements at trial on the grounds that they were not freely and voluntarily given, each objection was denied. (R. at 626, 640, 649 and 667). Faced with Bush's prior admissions, and with Muschott's own conclusions (discussed below) that Bush was competent and that he had assumed a leadership role in the Slater murder as well as in the 1974 rape of the nineteen year old, Muschott decided that his best defense (and his best chance of avoiding the death penalty for his client) was to argue that Mr. Bush never had any intention of killing Francis Slater, that he wanted no part in her death and that, in fact, he had schemed against his codefendants to spare her life. (See e.g., R. at 964, 969, 1002-03). This plan dove-tailed with Mr. Bush's fourth statement wherein he confessed that he had stabbed Slater but stated that he did so only with the intention of feigning her death so that the other abductors would leave her alone. It was also substantiated by Bush's claim that he refused Pig Parker's attempt to force the gun on him in demand that he kill the victim. Muschott urged such aspects of Bush's confes-

sions upon the jury along with the testimony of the examining physician to the effect that Slater's stab wound was only two inches deep and was not fatal, and along with certain other mitigating factors such as Mr. Bush's voluntary confessions and his role in breaking the case for investigating officers. Since Bush struck Muschott as being "very cold" and unremorseful, and since Muschott feared that prosecutors would be able to trick a testifying Bush into opening doors to his disadvantage, Muschott urged Bush not to take the stand at trial. (H. at 355, 370). Bush complied and the jury found him guilty on all counts.

During the sentencing phase, Mr. Muschott chose to present no evidence in mitigation although he could have presented what he had regarding Bush's family background, prison experience, and possible intoxication or mental disability. He made his decision for three reasons: (1) there was no mental disability to exploit and any attempt to create one would only have damaged his credibility with the jury; (2) Bush had confessed that he knew what he was doing on the night of the murder and any post-trial attempt to show intoxication would, likewise, have damaged his credibility; and (3) any evidence offered in an attempt to paint Bush as a docile, sympathetic and "sheeplike" follower would have been false, as well as unsuccessful, and would have invited the prosecutors to offer details of the prior rape, robbery and kidnapping in rebuttal. Muschott thought the state was saving its "heavy artillery" for just such an opportunity. (H. at 371). His strategy was to leave the state hanging with its "bare bones" aggravating circumstances

argument by never opening the all too obvious doors through which the state planned to usher in unwelcomed facts. (H. at 371). At the same time, Mr. Muschott would ask the jurors to take into the jury room a recording of Bush's third statement to the police. According to Muschott, only in the third statement did Bush present himself as a sympathetic, remorseful person. (H. at 370, 403). That way, Mr. Bush could address the jury in his most sympathetic posture, without the fear of damaging cross-examination and without the risk of opening any doors. In Muschott's words, "the beauty of the tape in the jury room was that we didn't open any doors. That was a device that was utilized in closing argument. The tape was already in evidence. And we didn't have to risk anything by using [it]." (H. at 371). Muschott developed this strategy early in the case (H. at 422) and had discussed with Bush, Bush's father and Bush's brother, the pros and cons of taking the stand. (H. at 361-62, 370, 422).

After the state had presented its "bare boned" argument for the death penalty, the trial court recessed for lunch. Just as it reconvened, Bush leaned over to Muschott and told him he had changed his mind and was going to testify. (H. at 372). Muschott reasserted his recommendation that Bush not testify, but Bush insisted, and Muschott felt obligated to put him on the stand. (H. at 372-73). Muschott conducted a brief direct allowing Bush to tell his version of the events surrounding the crime. Then he had no choice but to turn his client over for cross-examination. In Muschott's words, it was "devastating." (H. at 375). Bush

appeared "totally without remorse, ruthless, [and] cold;" and he stared at the jury "menacingly" during the entire time he was on the stand. (H. at 374). Although the jury requested and received a copy of the third statement, they returned with a 7-5 recommendation that Bush receive the death penalty for the murder of Francis Slater.

In hindsight, Bush faults Muschott for not pursuing defenses based on his incompetence and on his "sheeplike" disposition. In short, Bush's appellate lawyers claim their client did not know what he was doing during the crime, was not able to assist in his defense, and only acted as he did because he was coerced into doing so by defendants Parker, Cave and Johnston. All in all, they raise 17 claims.

CLAIM I

THE PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Specifically, Bush alleges six (6) errors which rendered his counsel's performance constitutionally defective. The Court will address each in the order in which it was raised.

(a) The petitioner claims that he was and is mentally incompetent but that his counsel made no effort whatsoever to investigate, develop and present evidence of incompetency to the jury. Petition, at 8.

There is adequate evidence to indicate that the petitioner's trial counsel made an effort to determine whether he might be incompetent to stand trial but concluded, upon consultation with a

psychiatrist and Mr. Bush, that incompetency was a "dead end." (H. at 322-33, 342, 377-78, esp. 326 and 335). Bush displayed signs of intelligence throughout the commission of his crimes, during his interrogations and during trial. He owned the get-away vehicle and the murder weapon. He drove the four men away from the scene of the crime. Within an hour of its commission, they were pulled over in a remote portion of western St. Lucie County by deputy Tim Vargo. Having no way of knowing the reason for their stop, the men discussed whether to shoot deputy Vargo but opted against it upon Bush's suggestion that they "just wait and see what happens."⁶ As it turned out, Vargo had pulled the men over because Bush's car had a defective tail light. Vargo stated that Bush was "calm, cool and collected."⁷ He produced his driver's license and registration, acted normally and did nothing to arouse suspicion. Mr. Bush maintained his composure even when deputy Vargo pulled him over a second time after a computer check revealed a problem with the car's registration.. (H. at 381-83).

Between the time of the murder and the trial, Mr. Bush did numerous things which evinced his competence and his ability to appreciate the criminality of his conduct. His co-defendants made statements to the effect that Bush had analogized the crime with his prior commission of rape (for which he was sent to prison) and encouraged disposing of Miss Slater to prevent a recurrence of his

⁶The quote is attributed to Muschott's recollection. H. at 383. His performance must, of course, be assessed against his understanding of the facts at the time.

⁷Id.

prison experience. (H. at 349-50, 379). Bush attempted to hide the murder weapon at his brother's house but, after the crime began to receive publicity, he returned to his brother's house, retrieved the gun and cast it into Taylor Creek. (R. at 828-30). The weapon was never recovered. Bush made significant efforts to recover his vehicle, which the police had seized, and even directed his counsel to act on his behalf in retrieving same. (H. at 358).⁸

As indicated, the same counsel who represented Bush in his trial for rape was initially appointed to represent him in the instant trial for kidnapping, robbery and murder. Despite that counsel's advice that Bush not give any more statements than he had already given, Bush initiated contact with Sheriff Holt and volunteered his confession.⁹ (R. at 810-49, H. at 381-82). As in the other three statements, Bush gave the impression that he knew what he was doing at all relevant times. (H. at 386). He even told officers that during commission of the crime he was scheming against his companions to find a way to spare the victim's life. (R. at 822-23, 840). Attorney Muschott testified that Bush had no problems communicating; that he had initially asserted an alibi

⁸Muschott testified that Bush "was very adamant about certain things he wanted looked into with respect to his car. Mr. Bush was never hesitant to communicate with me about the case or about any other matters that he felt needed attention from me or anybody else." (H. at 358).

⁹Bush gave four statements to the police. In the first he denied everything. In the second he admitted to being present during the crimes. In the third he admitted his participation but denied that he stabbed or shot the victim. In his fourth he admitted that he stabbed the victim but denied that he shot her. (R. beginning at 626, 640, 649 and 667).

(but subsequently withdrew it); that he refused to enter the courtroom without his shoes; that he gave no indication that he was ever out of touch with reality during the crime; that he understood the incriminating nature of his conduct during the crime; and that he appeared to have average intelligence. (H. at 355, 390-91).

Even so, Muschott met with Dr. Tingle on August 12 of 1982 and spent between thirty minutes and an hour discussing the facts of the case against Bush, the facts Muschott knew relevant to Mr. Bush's background, education and family life, the facts relating to the rape, Bush's prison experience, Muschott's impressions of Bush and all matters known which were relevant to the prospects of developing a psychologically based defense during the guilt/innocence or sentencing phase of the trial. (H. at 322-35). The two discussed all records of which Muschott was aware (such as police reports, co-defendant statements, etc.) they considered personality testing, and they discussed Bush's mental status from the time of the offense up until the time of their conversation. (H. at 334-35). Ultimately, Dr. Tingle concluded that there was nothing that he could do to help Bush's defense. (H. at 376-78). The position in which Muschott found himself is well represented in the following exchange between he and petitioner's appellate counsel before this Court:

Q. Now, at the time of Mr. Bush's sentencing in 1982, is it fair to say that you had not developed at that point or did not have at that point any mental health mitigating evidence, any expert testimony along those lines?

A. Had not developed anything, that's correct.

Q. So, at the time, you didn't do a weighing process, should I put this on, should I not put this on, in that regard?

A. Well, I had done that weighing process prior to the sentencing phase of the trial.

Q. Right. But I guess my point is, you couldn't weigh something you didn't have?

A. Well, I couldn't have something I couldn't develop. ...[A]t that point [I] had not...been able to develop anything that [would have] outweighed what would have come in on the coattails of that from the state (emphasis added).

(H. at 342).

Bush's demonstrated ability to make his own decisions (about how to cover up his crimes, who to talk to and when, which lawyer to have appointed, etc.) belies his claim that he was incompetent to stand trial while, at the same time, it compelled his lawyer's strategic decision not to risk credibility by attempting to paint Bush as a passive participant who was simply led astray by a "bad crowd." In light of the information known to attorney Muschott at the time, it was not constitutionally ineffective for him to forgo the incompetency route. Even now, seven years after the fact, Bush has failed to raise a substantial doubt about his competence. See Claim III, below. During the time at which Muschott had to make decisions regarding trial strategy, the suggestion of incompetence was even more farfetched. Upon its independent consideration, this Court agrees with the Florida Supreme Court that there was no evidence then available and known to Muschott, suggesting that Bush was incompetent to stand trial. See Bush, 505 So.2d 409, 410-11 (Fla. 1987). In the absence of evidence indicating that Bush was

incompetent, and in the presence of so much evidence attesting to his competence, his defense was not rendered ineffective by counsel's decision not to pursue incompetency further than he did. See Burger v. Kemp, 483 U.S. ___, 107 S.Ct. ___, 97 L.Ed.2d 638 (1987); Lindsey v. Smith, 820 F.2d 1137, 1144 (11th Cir. 1987); Solomon v. Kemp, 735 F.2d 395, 402 (11th Cir. 1984).

Petitioner's assertions to the contrary notwithstanding, Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) does not entitle him to a competency evaluation even when his counsel concludes, after consulting with a psychologist, that such an evaluation would be futile. His counsel's failure to secure one in this case was not ineffective within the parameters established by Strickland. See also Bowden v. Kemp, 767 F.2d 761 (11th Cir. 1985); Martin v. Wainwright, 770 F.2d 918, 934-35 (11th Cir. 1985). Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987) (counsel not ineffective for failing to conduct detailed investigation into petitioner's mental history given strategic decision that insanity defense unlikely to be successful). See also Claim IV, below.

(b) The petitioner claims that he was intoxicated at the time of the murder, that his intoxication negated any specific intent to commit the crime and that his attorney's failure to request an instruction on voluntary intoxication was the result of ignorance and not trial strategy. Petition, at 9-17, citing Gardner v. State, 480 So.2d 91, 92-93 (Fla. 1985).

Mr. Muschott knew that the defendants claimed to have been drinking and smoking marijuana on the night of the murder. (H. at

345). He decided not to push the intoxication defense, however, since he felt it would have undermined his credibility with the jury. (H. at 388). If Mr. Muschott had argued that Bush was so intoxicated that he was unable to formulate a specific intent to commit the crimes, he would have had to explain (a) why Bush did not appear intoxicated to deputy Vargo who pulled Bush over twice within an hour of the murder in the wee hours of the morning at a time when officers are most suspecting of drunk drivers;¹⁰ (b) why Bush had admitted prior to trial that he knew what he was doing, that he did not drink as much as the others and that he was not so drunk as to be unaware of what was happening, (R. at 768, 769, 774, 785, 1188-1190); and (c) how it was that his intoxication prevented him from formulating the specific intent to commit the crimes but did not prevent him from scheming to foil his co-defendants' murderous intentions. The decision to pursue one of two mutually exclusive defenses does not amount to unconstitutionally ineffective representation.

(c) The petitioner claims that his attorney failed to offer "exculpatory" evidence to prove that Bush was not the triggerman;

¹⁰Muschott testified:

I know from experience in law enforcement, particularly road officers, that in any late night stop situation, one of the first things they're going to look for is to determine whether the driver is under the influence and that would be appropriate to make a DUI arrest or at least to give roadblocks. And it's been my experience that they give roadblocks if there's any indication of alcohol on the breath or impairment of faculties.

(H. at 387-88).

thus the government was able to produce a picture of the victim's lifeless body and argue, in closing, "[t]his is what happens when John Earl Bush fires a .38 caliber bullet into her head." Petition, at 17-24.

Muschott testified that the state never took the position, by argument or presentation of evidence, that Bush fired the gun. (H. at 315). He argued there was no reason to present evidence to disprove something the state had no intention or means of proving. Id.¹¹ The primary evidence available to Muschott would have been (a) Bush's testimony to the effect that he was not the shooter, and (b) Pig Parker's statement to Georganna Williams to the effect that he, Parker, had fired the gun. (H. at 313). Mr. Muschott could not have contemplated offering the first since he had planned to keep Bush off of the stand right up until the very end when Bush insisted on taking it (at the sentencing phase).¹² Muschott feared eliciting the second since it might have opened doors through which the state might have offered details about Bush's prior conviction for rape, i.e., the victim's psychological devastation.¹³ (H. at 314).

¹¹In his closing statement, prior to the state's remarks, Muschott said, "There's no question from the evidence that this girl was shot by Pig Parker and I don't believe there is any question from the evidence that the weapons were wielded by Parker, and wielded by Cave." (R. at 970).

¹²Even so, this evidence was elicited by the submission of Bush's statements to the police. He consistently denied that he pulled the trigger and the state had nothing to refute the denial.

¹³Pig Parker's confession to Ms. Williams was given along with the explanation that, because of Bush's prior conviction, the state would hang everything on him, in spite of who pulled the trigger.

Even so, at no time prior to closing was Muschott given any indication that the state would seek to argue something he knew it had no hopes of proving. The prosecutor's inexplicable¹⁴ closing remark was given within a context designed to outline the state's case against Bush for felony murder based on his participation in the robbery and kidnapping. (R. at 989-1003). None of the evidence showed Bush to be the shooter. Therefore, Muschott was able to diminish the prosecutor's closing argument by a response which reasserted Bush's claim that he was scheming to buy time between the abduction and the murder, but that time ran out when

Pig Parker [shot] this girl in the back of the head, not in response to anything Mr. Bush did, but in response to Pig Parker's robbery, in response to Pig Parker's and Cave's abduction of the girl and in response to Pig Parker's knowing that the girl could identify him.

(R. at 1003) (emphasis added). The state offered nothing to show that Bush was the triggerman; and its error during closing may have undermined its credibility with the jury. Before sentencing Bush, the trial judge stated:

Of course, the only version of the actions that took place that night that we have come[s] from your statements both out of court and in court. I guess we don't have to believe your statement, but since there is no other evidence we can't act upon anything that wasn't in evidence. So we must assume that you were an accomplice in the offense and we must assume, that from the evidence of Dr. Wright, that the actual death occurred as a result of the bullet wound and the only evidence, direct evidence that we have is that another person imposed that. (emphasis supplied).

¹⁴But see the Court's discussion of this statement in Claim VI below, especially at page 51-52.

(R. 1304-05). Muschott's decision not to present evidence to prove that Bush was not the triggerman was clearly within the wide parameters of attorney discretion afforded in Strickland. No evidence was offered to prove otherwise and he, Muschott, had no reason to believe the state would suggest that Bush had pulled the trigger. The suggestion came only in closing at which time Muschott had the opportunity to exploit the contradiction. (H. at 369). See also Claim VI, below. He did so.

(d) The petitioner claims that his attorney failed to file pre-trial motions contesting the admissibility of petitioner's various confessions, of identifications obtained at a pre-trial line-up, and of hypnotically-refreshed testimony. Petition, at 24-36.

These omissions are non-prejudicial. The hypnotically-refreshed testimony to which the petitioner refers is that of one "Danielle Symons." She testified at trial that she had seen Mr. Bush in the convenience store on the night of the murder in the company of three other black men. (R. 348). This evidence, like that obtained at the pre-trial line-up, is so cumulative that it could not be prejudicial. There is no contesting Bush's role in the crimes: it was established by his own testimony. He does not deny his presence in the store that night, nor his participation in the crime: nor has he denied either since the first statement to the police.

Mr. Muschott did object to the use of Bush's statements on the ground that they were not given voluntarily. (R. at 627, 640, 649,

650). Appellate counsel faults Muschott for objecting during trial instead of before. This does not a Strickland violation make. See Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985). Even so, the alleged error was not prejudicial. The trial judge found the statements to have been voluntarily given, his decision was affirmed on direct appeal, Bush, 461 So.2d at 939; the record itself reveals the voluntariness of the statements, (see SR at 104-05 and the cites therein), and upon independent consideration of that record in light of the petitioner's instant claims, this Court has reached its own conclusion that the confessions were indeed voluntarily made. See Claim X, below. Mr. Muschott could not possibly have altered this result by objecting earlier than he did.

(e) The petitioner claims that his attorney failed to offer any defense whatsoever. Specifically, the petitioner faults his counsel for not arguing voluntary intoxication, coercion and lack of intent. Petition, at 36-39.

Muschott's decision not to pursue the voluntary intoxication defense beyond the extent that he did is addressed in ground (b), above. His alleged failure to argue lack of intent is belied by the facts: Muschott centered Bush's defense around the argument that Bush never intended to kill Slater, that he did not inflict the fatal wound and that the wound he did cause was inflicted in an effort to prevent the others from committing the murder. In response to the claim that Muschott should have argued that Bush was a passive, "sheeplike" character who only did what he did at the direction of others, Muschott stated that had he argued coer-

cion (i) he would have lost credibility with the judge and jury because the facts showed Bush was at least a co-leader with Pig Parker; (ii) the state would have sought to introduce evidence about Bush's background which showed him to be aggressive, not passive; and (iii) he, Muschott, would have been making an argument which he could not in good conscience make.

Many of the facts reviewed above reveal Bush to be an assertive individual. In addition, Bush himself stated that he was urged by the others (Parker, Cave and Johnson) to outrun deputy Vargo when the latter pulled the four over on the night of the murder. (R. at 825). Bush said he refused their request even though he believed he could have outrun the deputy if he had so desired, and that he pulled over because he wanted to confess the crime then and there. Id. Muschott was also concerned that the state would seek to introduce statements from the other three abductors to the effect that "Bush had said during the course of the abduction and prior to the murder that, 'we need to get rid of the victim,' because he--it was either he or his brother, had gone to prison once before because they didn't get rid of the victim, and that wasn't going to happen again." (H. at 348, 357, 379-80).

The state took the position that Bush had been a leader in the prior rape. Evidence of that leadership, as well as the fact that its victim had fingered Bush from the witness stand, could have been used to buttress the state's argument in favor of the death penalty for the Slater murder. Muschott feared that such evidence might be admitted to counteract any claim that Bush was

subject to coercion. (H. at 348, 379-80 and R. at 346, 357). The Court also notes that any attempt to paint Bush as the defenseless subject of manipulation and coercion might have undermined the attempt to prove that he was scheming to foil his cohorts murderous inclinations.

Finally, Muschott stated that he did not pursue the coercion argument because it would have been a lie. When asked about his view of Bush's role in these three crimes, Muschott said, "I felt that the facts demonstrated or indicated to me or left me with the impression that Mr. Bush was the leader of the group, or certainly the best case scenario from his standpoint, at least the co-leader with Parker. But I felt really that he was the lead person." (H. at 357). Muschott testified that Bush was not at all passive or submissive, but "was very...aggressive." (H. at 358); "adamant about certain things," (H. at 358). The Court notes Bush's rejection of attorney Schopp's advice that he not volunteer a fourth confession and his insistence on testifying during the sentencing phase despite attorney Muschott's advice that he not. Mr. Muschott felt that Bush wanted to be in the spotlight. (H. at 373). Strickland does not compel an attorney to urge an argument which he reasonably finds to be futile, let alone one he finds to be false.

(f) The petitioner claims that his attorney failed to consult with independent experts in effort to contradict the testimony of the Medical Examiner and a Criminologist who testified at trial. Petition, at 39-46.

Two forensic science experts testified at Bush's trial and at the trial of his co-defendants: Dr. Ronald Wright, the medical examiner who performed the victim's autopsy and Daniel C. Nippes, the criminologist who used hair and fiber analysis to "place" the victim in Bush's vehicle on the night of the murder. Dr. Wright testified that the superficiality of the victim's stab wound was consistent with evasive action. (R. at 466-7). Nippes testified that hair he found in Bush's car had been forcibly removed from Miss Slater's head (R. 920); he also testified that her bladder release was consistent with fear prior to death. (R. at 471). Bush faults Muschott for not cross-examining Wright and Nippes on those aspects of their testimonies. Specifically, Bush suggests that effective cross-examination could have established that (i) the superficiality of the wound was consistent with Bush's story that he did not intend to murder the victim; (ii) there are other ways that hair can be forcibly removed, i.e., vigorous brushing; and (iii) there were other possible causes for the victim's bladder release than fear, i.e. her death. Petition, at 39-43. The Court finds these alleged failures non-prejudicial.

First, attorneys for defendants Parker and Johnson tried to establish (ii) and (iii) through cross-examination at their respective trials. Both were convicted.¹⁵ Second, the Court can only

¹⁵Parker received the death penalty; Johnston, who played a less significant role than the others, received a life sentence. Even so, it is their convictions, not their sentences, with which the Court is now concerned. In Claim I, Bush is challenging his counsel's effectiveness during the guilt/innocence phase of the trial, not during the sentencing phase.

imagine the ridicule with which prosecutors might have riddled Mr. Muschott's efforts to suggest that Slater's hair had been ripped from her head by "vigorous brushing." Even had they not so argued, the Court cannot imagine any scenario in which Bush's conviction would have been thwarted by even conclusive proof that his victim had forcibly removed her own hair at an earlier time and transferred it into Bush's car only by accident, or proof that Francis Slater wet her pants on the night of her murder, not because she was in any fear, but simply because she died.¹⁶

Finally, while appellate counsel has succeeded in locating a medical examiner in the state of Georgia who will affirm several years after the fact that Slater's stab wound would not be inconsistent with the story that Bush had not intended serious injury, that hardly proves that Muschott's failure to do the same seven years ago, or even to cross-examine Wright on the point, amounts to constitutionally defective and prejudicial representation. Mr. Muschott cross-examined Dr. Wright regarding the stab wound and elicited the admissions that (a) it was not fatal and (b) it was so shallow and superficial that Wright had difficulty measuring its depth. (R. at 471-73; SR at 109-110). Moreover, Muschott argued that the superficiality of the wound was consistent with Bush's claim that he intended no serious injury. (R. at 824, 969, 1181;

¹⁶In Parker's trial Nippes was asked on cross-examination if Slater's complete bladder release was not "equally consistent" with the conclusion that it was caused by death and not fear. Nippes responded, "[n]o, it's not equal because it's highly unusual to have the bladder completely emptied, and also the staining around the pants. But that does occur." (Transcript of Parker's trial, at 669).

SR at 110). This hardly qualifies as inefficient, prejudicial cross-examination. See Martin v. McCotter, 796 F.2d 813, 818 (5th Cir. 1986). Accordingly, Claim I is denied.

CLAIM II

THE PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The petitioner argues that his trial counsel rendered ineffective assistance during the sentencing stage of the trial for the following reasons:

(a) counsel failed to investigate and present evidence detailing Bush's sympathetic background, including his disadvantaged childhood and his traumatic prison experience,

(b) counsel failed to investigate and present evidence of Bush's intellectual and psychological impairments,

(c) counsel failed to investigate and present evidence to show that Bush did not kill or intend to kill,

(d) counsel failed to investigate and present evidence to show that Bush's participation in the crime was the result of physical and psychological coercion, and

(e) counsel failed to investigate and present evidence to show that Bush was intoxicated at the time of the offense.¹⁷

¹⁷The record presented by the petitioner in this case is extensive. There is no doubt that much if not all of this potential mitigating testimony would have been relevant and could not have been excluded from consideration had it been presented. See Hitchcock v. Dugger, 481 U.S. 393 (1986); Skipper v. South Carolina, 476 U.S. 1 (1986). However, the relevancy of the evidence and the trial court's duty to allow its introduction do not have a bearing on the issue at hand, i.e. whether counsel acted reasonably in deciding not to introduce the evidence out of apprehension that it would do little for his client's chances while revealing possibly damaging details about his past. See Burger v. Kemp, 97 L.Ed.2d 638, 654 n.7 (1987).

To a large extent, grounds (b) - (e) are simply reassertions of grounds addressed in Claim I above. Mr. Muschott's decision not to pursue, further than he did, Bush's alleged psychological defects, mental deficiencies, incompetency, intoxication or coercion, etc., was supported by his reasonable, professional judgment. His decision to proceed as he did, without offering evidence in mitigation, was a deliberate one; it was not the result of oversight or ignorance. Under the circumstances of this case, the Court cannot say that such a decision fell beyond the wide range of competence demanded of attorneys in criminal cases." Strickland, supra at 687 and 690. See also Thomas v. Wainwright, 787 F.2d 1447, 1449 (11th Cir. 1986). As far as Muschott was concerned, to argue that Bush was intoxicated, or that he got in with a bad crowd that made him act against his will, or that he was mentally deficient while he committed the crimes, was to argue a falsehood or a set of falsehoods which would have proven ineffective. To switch strategies between the guilt/innocence phase and the sentencing phase would have cost him whatever credibility he had with the jury. This is especially true where, as here, the "evidence" of the defendant's psychological deficiencies was so weak.

Muschott did not believe that Bush suffered from any mental deficiency, nor did he have reason to believe so. Muschott did not believe that Bush was coerced into acting as he did; indeed, Muschott thought Bush to be a co-leader in the instant crime and a leader in a former one. The facts of which Muschott was aware painted Bush as a cold, remorseless man who was a major participant

in six atrocious crimes against two defenseless women within a few years of each other--one of which took place when Bush had barely been out of prison three years. Muschott weighed the very questionable beneficial value of a defense based on psychology against the very real threat that such a defense would open the door for the state to introduce, in rebuttal, the details of the 1974 rape and the damaging statements of Bush's co-defendants. He decided that the real threat outweighed the potential benefit. That decision did not render his representation constitutionally ineffective.

Likewise, petitioner's argument that Mr. Muschott failed to investigate his personal background is without merit. Contrary to his current counsel's assertion, this is not a case where the trial lawyer conducted no investigation whatsoever. Mr. Muschott discussed possible mitigating information with Bush, his brother and his father, on numerous occasions. He specifically discussed with them Bush's personal and family history. Muschott talked with Bush's girlfriend and his brother-in-law about the possibility of finding and presenting mitigating evidence. Muschott was well aware of Bush's poor family background and Bush's life in prison including the physical abuse to which he was subjected. However, both Bush's father and brother indicated that they did not wish to testify and Bush himself stated that he did not want his father to testify. No other family members came forward in Bush's behalf despite Muschott's willingness to talk with them. Muschott made an independent evaluation of the usefulness of the character and back-

ground information provided and decided that it was not significantly beneficial to his client's case. The decision was deliberate; it was not the result of oversight or ignorance. Again, Muschott weighed the possible benefits of this evidence against the rebuttal it invited and concluded that he and Bush were better off without them both. In a hearing before this Court, petitioner proffered the evidence of his background which he now suggests should have been offered in mitigation at his sentencing hearing. This Court considered that evidence and found it of little value. Muschott's decision not to offer it in mitigation was clearly within his discretion.

The trouble with Muschott's strategy is that Bush refused to follow it. After having succeeded in keeping the prosecutor from cross-examining his client and in leaving the state with only its "bare bones" argument, Muschott was prepared to urge upon the jury Bush's third statement to police. Therefore the last, and perhaps strongest, impression the jury would have had of Bush would have been in his favor. But Bush ruined it; he insisted on testifying. He waited for his counsel to construct the defense...and then he pulled the linchpin. Muschott made the bid, then Mr. Bush changed trumps. The effect was devastating. Even so, five jurors were swayed.¹⁸

¹⁸Petitioner makes repeated reference to the claim that five of his jurors recommended he receive a life sentence in spite of his counsel's allegedly poor performance. It may very well be that he received those five votes only because of his counsel's thoughtful strategy. The point is that the 7-5 split does little, if anything, to bolster petitioner's argument that his counsel was ineffective.

Petitioner's poor performance at the sentencing stage cannot be blamed on his counsel. It is clear that the two of them agreed well before trial that Bush would not testify. Bush's last second decision to do so against the advice of counsel cannot now be twisted into an argument for ineffectiveness. See Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985) (when a defendant preempts his attorney's strategy by insisting on a different defense, no claim for ineffectiveness can be made).

The Court finds that Muschott's decisions were supported by reasonable professional judgment. Mr. Muschott's decision not to offer evidence of Bush's purportedly good character was a sound, strategic one in light of his reasonable belief (confirmed in the hearing before this Court) that the state would have introduced evidence of Bush's violent past and facts regarding his prior conviction in rebuttal. Having thoroughly discussed the matter with Bush's closest relatives and learned of their reluctance to testify on Bush's behalf, Muschott's decision not to pursue the investigation further was not unreasonable. See Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985). While Muschott might have conducted a more thorough investigation into possible mitigating evidence, "in considering claims for ineffective assistance of counsel, '[the court] address[es] not what is prudent or appropriate, but only what is constitutionally compelled.'" Burger v. Kemp, 97 L.Ed.2d 638, 657 (1987) quoting United States v. Cronin, 466 U.S. 648, 665 n.38 (1984). The Court is mindful that "strategic choices made after less than

complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. Applying this standard to the case at bar, the Court finds that the decisions made by Muschott were supported by reasonable professional judgments and that there was a strategic basis for his decision not to present any mitigating evidence at the sentencing phase of the trial. Claim II is therefore denied.

CLAIM III

THE PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HE WAS INCOMPETENT TO STAND TRIAL.

Claim III intermingles several claims. Petitioner asserts that he was incompetent to stand trial; that he never received a Pate v. Robinson hearing at which incompetency would have been established; and that his counsel was ineffective by allowing an incompetent man to stand trial. Petition, at 107-31. Muschott's alleged ineffectiveness in this regard is adequately considered in Claim I, grounds (a) and (e) above. Petitioner's alleged "incompetency" is the same claim considered and rejected by the Florida Supreme Court on collateral attack. To reiterate: the court concluded that there was absolutely no evidence suggesting that Bush was incompetent to stand trial. Bush, 505 So.2d 409, 410-11 (Fla. 1987).

The 11th Circuit recently reiterated the circumstances under which incompetency should be considered in a habeas petition:

Claims of competency to stand trial should not be considered in habeas corpus proceedings unless the facts are

'sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during a criminal trial.'

Rivers v. Turner ___ F.2d. ___ (11th Cir. June 6th, 1989) quoting Bruce v. Estelle, 483 F.2d 1031, 1043 (5th Cir. 1973), subsequent opinion, 536 F.2d 1051 (5th Cir. 1976) cert. denied, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977).

Prior to filing this habeas petition, the petitioner had not presented any evidence to overcome the finding of the Florida Supreme Court with regard to competence. Herein, he relies primarily on the testimony of a "Dr. Carbonell" who, after reviewing Bush's background and subjecting him to a battery of intellectual and psychological tests, decided that he did not have an "anti-social disorder," (H. at 91), and was not retarded (H. at 96), but that he had learning deficits which she felt were indicative of brain damage. (H. at 98-101). She also concluded that Bush had an "extreme emotional disturbance" at the time of the murder (H. at 106-07) and that he was without the capacity to conform his conduct to the requirements of law (H. at 108). In a report requested by Mr. Bush's current counsel, Carbonell wrote that he may have been incompetent to stand trial because his verbal deficiencies precluded him from understanding words and concepts like "premeditation," "felony murder" and "accomplice liability," and because Bush could not understand why he was being tried for murder when he did not pull the trigger. (Petition at 130, citing Appendix O). In testimony before this Court, Dr. Carbonell said that she believed

Bush to be a passive, "sheep-like" follower who acted under the "substantial domination" of the other defendants. (H. at 111-114). She admitted, however, that Bush's competency was difficult to assess in retrospect. (H. at 142, Petition at 128, citing Appendix O). Her examination was conducted more than five years after the fact.

Dr. Carbonell's conclusions regarding petitioner's verbal deficiencies and possible brain damage were consistent with those of a "Dr. D'Amato" who examined Bush before April 18, 1986, also at the request of Bush's appellate counsel. D'Amato's findings were available to the Florida Supreme Court when it considered, and ultimately rejected, Bush's collateral attack. D'Amato's letter to that counsel indicates that although Bush maintained a "venier [sic] of coldness and toughness," he was cooperative and "able to develop a rapport" with his examiner. State's Exhibit NN, at 6). D'Amato wrote that Bush:

does not experience any illusions, auditory or visual hallucinations, or other types of hallucinations....

[He] was oriented to time, place, and person and sensorium was intact....His thought content was void of obsessions, compulsions, phobias, derealization, depersonalization, suicidal ideation, homicidal ideation, delusions, ideas of reference, and ideas of influence. His stream of thought as manifested by his speech is free from any associational disturbances.

Id. The Florida Supreme Court wrote that Bush's

newly appointed psychiatric expert offers only weak support to Bush's claims. The numerous psychological problems now pointed out, such as learning disabilities, a passive and dependent personality, and possible 'diffuse organic brain damage' do not, when taken together, sufficiently raise a valid question as to Bush's competency to stand trial (cites omitted).

Bush v. Wainwright, 505 So.2d 409, 410-11 (Fla. 1987). This conclusion was correct; and, contrary to petitioner's apparent belief, it is not rendered otherwise by the submission of yet another psychiatrist to second Dr. D'Amato's opinion. Upon independent consideration of the expert testimony presented throughout this case, both before and since the Florida Supreme Court's decision, and in light of the record itself, this Court does not find that Bush has raised a doubt about his competence sufficient to merit a reopening of the issue on appeal.

Without repeating all of the factors considered in Claim I (a) and (e), above, (attesting to Bush's competency to stand trial) the Court simply incorporates them here by reference and notes, again, that petitioner's attorney, Muschott, testified that Bush had no problems communicating, gave no indication that he was out of touch with reality during the crime or at trial; appeared to understand the incriminating nature of his conduct; and displayed average intelligence. (H. at 355, 390-91). Since the petitioner has raised no serious doubt about his ability to participate meaningfully in his own defense during trial, Rivers directs this Court to give the claim no further consideration. Claim III is denied.

CLAIM IV

THE PETITIONER WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER AKE V. OKLAHOMA AND THE FIFTH, SIXTH AND EIGHTH AMENDMENTS, WHEN THE DEFENSE PSYCHOLOGIST APPOINTED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A COMPETENT AND APPROPRIATE EVALUATION.

Next, Bush contends that Dr. Tingle's inadequate psychiatric evaluation deprived him of his fifth, sixth, eighth and fourteenth amendment rights as articulated in Ake v. Oklahoma, 470 U.S. 68 (1985). In Ake, the trial court denied a defendant's request for a psychiatric examination to determine the defendant's sanity at the time of the offense. The United States Supreme Court reversed finding that:

[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83. However, the Supreme Court cautioned that:

A defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance ... would be of probable value in cases where it is not. The risk of error from denial of such assistance, as well as its probable value, are most predictably at their height when

the defendant's mental condition is seriously in question. When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent.

Id. at 82-83.

Here, the appointment of Dr. Tingle was not required under Ake. Bush made no showing whatsoever that his mental condition or

sanity was going to be in issue. See Motion for Appointment of Psychiatrist and Psychologist, R. 1502, and Order granting motion, R. 1526. Bush exhibited no behavior which would have led his counsel, the police or the trial court to question his competency or sanity. Without some form of preliminary showing, a defendant is not entitled to the appointment of psychiatric assistance. Id. at 82-83. See also Clark v. Dugger, 834 F.2d 1561, 1564 (11th Cir. 1987).

This being the case, the Court finds that Bush was not prejudiced by Dr. Tingles' performance in this case. Bush's counsel discussed all the facts he had gathered about Bush and the crime with Dr. Tingle. Following this discussion, both men concluded that Bush's sanity and competency would not be an issue in the case. As discussed in Claims I and II, this decision was not unreasonable. Dr. Tingle's failure to pursue the psychiatric examination further was the result of Bush's counsel's reasonable tactical decisions.. Since Bush failed to make the preliminary showing that competence might be at issue, he was not entitled to a psychiatric exam in the first place. The fact that his counsel sought the input of a psychiatrist to the extent that he did hardly establishes Mr. Bush's claim that an examination to which he was not entitled was insufficient. The Court finds that Bush's rights under Ake were not violated and Claim IV is therefore denied.

CLAIM V

THE PETITIONER'S SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT BECAUSE THE STATE COURT RECORD IS DEVOID OF A FINDING OF HIS INDIVIDUAL CULPABILITY.

Bush claims that his sentence of death is cruel and unusual because the trial court did not find he was individually culpable for the murder. Petition, at 142-53. As controlling precedent, petitioner cites Tison v. Alabama, 107 S.Ct. 1676 (1987); Cabana v. Bullock, 106 S.Ct. 689 (1986); and Enmund v. Florida, 458 U.S. 782 (1982). In Enmund, the United States Supreme Court held that the Eighth Amendment forbids the imposition of the death penalty against "one...who aids and abets a felony in the course of which a murder is committed...but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force...be employed." Enmund at 797, 102 S.Ct. at 3376. In Bullock, the Court indicated that such a finding need not be reached by a jury, but may be made by an "appropriate tribunal--be it an appellate court, a trial judge, or a jury." Bullock at, 102 S. Ct. at 19. In Tison, the Supreme Court declined to enumerate each and every particular type of conduct and state of mind that warranted the death penalty but concluded, "simply," that major participation in the felony committed combined with a reckless indifference to human life was sufficient to satisfy Enmund's requirement of culpability. Tison at 1688. It is clear in the instant case that,

¹⁹While noting that this finding could be made in either federal or state court, the Supreme Court stated that the latter alternative would be the "sounder one."

if not the trial judge, certainly the appellate tribunal found Bush to be a major participant in the underlying felonies committed. Tison suggests, therefore, that the imposition of the death penalty is justified if either found Bush to manifest even "reckless indifference" to human life, let alone an intention to take it.

In the instant case, this determination was made expressly by both the trial judge and an appellate tribunal, and implicitly by the jury. In the course of sentencing Bush, the trial judge stated:

The evidence that was presented in this case is that you were together with these other people during this entire evening, that it was your car, that you were doing all the driving and that it was your weapon. The evidence then shows that when you stopped down in that road you and Parker got out of the car and took the girl back and between the two of you you did her in.

You took the first step by stabbing her. You said you did not intend to kill her. Apparently the jury disbelieved that and I am privileged to disbelieve it as well. In any event, what you did, stabbing her, making her fall to the ground, facilitated and cooperated with Parker in what he did next, and therefore in my opinion there is no way to say what you did was relatively minor-
....

(R. at 1305). Despite the trial judge's refusal to accept Bush's claim that he lacked the requisite intent and despite that same judge's determination that Bush was a major participant in the murder and its underlying felony, Bush appealed his sentence to the Florida Supreme Court claiming an Enmund violation.²⁰ On appeal,

²⁰Petitioner might have alleged that the trial judge did not make his finding with sufficient specificity since the passage quoted in the text above arises within the trial judge's discussion of possible mitigating factors. Such an allegation would be futile however, since the appellate tribunal, the Florida Supreme Court, made an express finding of its own which satisfied Enmund. See text, below.

Florida's Supreme Court wrote:

the facts of this case show that Bush was a major, active participant in the convenience store robbery and [that] his direct actions contributed to the death of the victim. The degree of Bush's participation is sufficient to support a finding that his involvement constituted the intent or contemplation required by Enmund (emphasis added)."

Bush v. State, 461 So.2d 936, 941 (1984).²¹ By proffering Tison purportedly in his defense, Bush and his appellate counsel seem to suggest that intent plus major participation will not sustain imposition of the death penalty without an additional, specific finding of reckless indifference. This is absurd. But the Court is at a loss to glean anything else from the proffer. Both the trial judge and the appellate tribunal found intent: the former said that the jury had apparently disbelieved Bush's claim that he lacked intent and that he, the trial judge, was privileged to do the same; the latter found that petitioner's direct actions contributed to the death of the victim and that the degree of his participation supported the finding of intent required by Enmund. Accordingly, petitioner's Enmund claim must fail and Claim V is denied.

²¹It is significant to note that the Florida Supreme Court prefaced the above quoted passage with the following language: "We disagree with [Bush's] contention on the facts of this case-....The facts of this case show...." Bush v. State, 461 So.2d 936, 941 (Fla. 1984). In other words, the court was able to make an independent finding of its own, based on the facts of the case and not simply the lower court's conclusions, that Bush possessed the requisite intent to satisfy Enmund. Thus even if Bush were able to undermine the trial judge's conclusions by reference to Enmund, the Florida Supreme Court's independent findings would, and do, render any Enmund objections frivolous.

CLAIM VI

THE PETITIONER'S CAPITAL TRIAL AND SENTENCING PROCEEDINGS WERE RENDERED FUNDAMENTALLY UNFAIR AND UNRELIABLE, AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, DUE TO THE PROSECUTION'S DELIBERATE AND KNOWING PRESENTATION AND USE OF FALSE EVIDENCE AND ARGUMENT AND INTENTIONAL DECEPTION OF THE JURY, THE COURT, AND DEFENSE COUNSEL.

The petitioner maintains the prosecution knowingly utilized false evidence in order to acquire a verdict of "guilty" and a sentence of death. Specifically, he claims that the prosecution introduced into evidence the .38 caliber bullet it found beneath the driver's seat of his car but hid a report by Donald E. Champagne, an analyst with the Florida Department of Law Enforcement's Regional Crime Lab, which stated "[the bullet fragment found in the victim's head] appears to be a .32 caliber class plain lead alloy

bullet.²² Bush contends that the state "hid" a report by Detective Tom Madigan which reviewed Champagne's findings and concluded that the fatal wound was not inflicted by a .38 caliber bullet.

See Deposition of Tom Madigan, Appendix LLL to the Petition, at 44. He also claims that the prosecution was aware of statements made by his co-defendants to the effect that Parker shot Slater, while Bush only stabbed her, but that they attempted to prove he was the shooter, nonetheless.

Although the state presented no evidence during trial to suggest that Bush was the shooter, in closing argument after the guilt phase, the prosecutor made the following comments:

²²The report reads in full as follows:

RESULTS:

Exhibit #1

This is a badly damaged and distorted portion and fragment of what appears to be a .32 caliber class plain lead-alloy bullet as loaded to center fire revolver type cartridges. Remaining weight is approximately 77.3 grains. There is so much overscoring of the bearing surface that the probable make of weapon involved could not be determined. This bullet is of no identification value.

Exhibits #2, #3 and #4

These revolvers have been tests fired using some of the ammunition supplied. They were all found to be functional. The tests have been compared microscopically with the bullet, exhibit #1, with negative results.

REMARKS:

The exhibits will be returned.

See Appendix III to the Petition for Writ of Habeas Corpus.

You heard the first statement; he denied everything. You heard the second statement; he admits being there. You heard the third statement; he admits participating. You heard the fourth statement; he admitted stabbing. He didn't make a fifth statement and I don't know what it would be and it would be unfair for you to speculate what it would be. But I do know that they recovered from his car on the driver's side in the front seat a .38 bullet. They didn't recover it from the back seat where Mr. Cave was. They didn't recover it from the right front seat on the passenger's side where Mr. Parker was, and they didn't recover it from the right back side where "Bo Gator" was. They recovered it from where Mr. Bush was sitting the entire night driving that car. That's where the bullet came from.

(R. at 980).

Whose gun was taken with the gang in order to rob? Was it J.B. Parker's, as Mr. Muschott would suggest, that he was the ringleader? Was it Parker's? Was it Cave's? Was it Johnson's? No, it was John Earl Bush's. He described it as a .38 caliber gun. He described it in another statement as a .38 special. Remember what Mr. Nippes told you. This is a .38 Special. This is a live round. State's Exhibit Number 22 [the photograph of the gunshot wound] This is what happens when a live round is fired by John Earl Bush and smashes into the skull of Frances Julia Slater.

(R. at 992).

It is axiomatic that the state has a duty not to present or use false testimony and not to exploit false testimony by urging the jury to accept the truth of what it knows to be false. See Giglio v. United States, 405 U.S. 150 (1972); Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986); United States v. Sanfilippo, 564 F.2d 176 (5th Cir. 1977). However, not every use of false evidence entitles a defendant to relief. Brown, 785 F.2d at 1465. Before a defendant is entitled to relief, he must prove that the false evidence was "material" in obtaining his conviction or his sentence or both. Id. at 1465. Evidence in a case is "material" when "there

is 'any reasonable likelihood that the false [evidence] could have affected the judgment of the jury.'" Id. at 1465-66 quoting United States v. Bagley, 473 U.S. 667, 678 (1985) (plurality opinion). In the instant case there is no indication that the prosecutors presented false evidence; and the reputedly false "argument" which they made had no material effect in obtaining Bush's conviction or sentence.

First, even if the state urged a conclusion it could not support (i.e., that Bush shot the victim), the jury was not presented with false evidence. The evidence presented consisted of (1) Dr. Wright's opinions, (2) the live bullet, and (3) the photographs. Dr. Wright's testimony was consistent with Champagne's crime lab report. Both concluded that a positive determination of the caliber of the bullet could not be made and that the fragment was consistent with a .32. Bush does not contest the authenticity of the bullet or the photographs and he admitted that it was his gun that Parker used in the shooting.

Second, none of the evidence discussed above was "hidden" from the defense. Det. Madigan's testimony and the statements of Bush's co-defendants were available and known to Bush's counsel prior to trial. Det. Madigan's deposition was taken by counsel for Bush's co-defendants for Bush's case. Det. Madigan had a copy of Champagne's report at the deposition and even quoted from it during his testimony. See Deposition of Madigan at p.43. Mr. Muschott, while not present, was aware of the deposition and waived his right to cross. See Id. at p.2. During the guilt phase, the state

called Dr. Wright, the pathologist who conducted the autopsy on the victim's body. On direct, Dr. Wright testified that the bullet fragment was "consistent with being a .38" (R. 469). On cross, Muschott elicited from him the following information:

Q. Okay. Um-m, you have indicated the fragments that you removed of the projectile were consistent with .38 caliber. Were they consistent with any other caliber?

A. It [the bullet fragment] could have been a .32. The bullet here has been so badly flattened out and portions of the bullet have been lost because it disintegrated in such small pieces that they could not be recovered, that it is difficult to be certain whether it's a .32 or a .38. The general size is more consistent with a .38 than it is with a .32.

Q. You're telling us that you can't be certain at this point what the caliber was?

A. That is precisely correct.

(R. at 472-73). Moreover, Muschott was well aware of the statements made by the co-defendants and actually worked to prevent their introduction at trial.

Bush's argument here boils down to whether the prosecutor's comments cited above were material to the jury's decision in this case. In other words, whether there is any reasonable likelihood that the comments could have affected the jury's judgment. See Bagley, 473 U.S. at 678. The Court finds there is not. See also Claim I, grounds (c) and (f) above. It is clear from the record that the prosecutors were proceeding under two theories of first degree murder: felony murder and the aiding and abetting of premeditated murder. (R. at 989). Nowhere in the evidentiary phase of the trial or the sentencing did the prosecutor's attempt to put on evidence depicting Bush as the shooter. They depicted him as the

get-away driver, car owner, once-convicted felon and owner of the murder weapon. But they did not depict him as the shooter. They did not have to.

The petitioner's error is his assumption that without evidence proving he pulled the trigger he could not be convicted or sentenced to death:

Stone and Midelas knew that they were presenting a lie to Mr. Bush's jury. They deliberately presented it because they knew that Mr. Bush's pretrial statements alone were not enough for a capital conviction and death sentence. They needed the false 'shooter' theory to assure a first degree murder conviction and sentence of death.

Petition, at 172. Midelas himself informed the jury otherwise: "to establish the evidence required for a verdict of first degree murder, [Bush] didn't have to stab her, he didn't have to touch her." (R. at 989). And as the court would later inform the jury, in order to find John Earl Bush guilty of first degree felony murder they only needed to find that Francis Slater was dead, that her death occurred as a consequence of and while John Earl Bush and an accomplice were escaping from the immediate scene of a violent felony, and that, although the accomplice had done the killing, Mr. Bush aided, abetted, counseled, or otherwise procured the commission of the felony. (R. at 1007). There was ample evidence of Bush's participation in the robbery and of the aid he rendered in all of the crimes committed that evening to find him guilty of first degree murder. There was no need for the prosecutors to fabricate any "false shooter" theory. And, indeed, the evidence precluded them from doing so.

The only statement by the prosecution which suggested that Bush was the shooter was offered within a context designed to outline the state's case against Bush for felony murder based on his participation in the robbery and kidnapping. (R. at 989-1003). The felony-murder doctrine allows the guilt of he who pulls the trigger to be assessed against those who facilitated the violent felony during the course of which the trigger was pulled. In other words, it holds them each liable for the murder. In context, the prosecutor's statement simply equated Bush's actions with Slater's death in a manner contemplated by the doctrine of felony murder. The statement was figurative, not literal. None of the evidence showed Bush to be the shooter. The prosecutor argued that he did not have to prove Bush was the shooter; Muschott argued that Bush was not the shooter; the trial judge concluded that the only evidence they had showed Bush not to be the shooter and there is no indication that the jury ever had any misapprehensions about Bush's role in the crimes.

In closing, Muschott repeated the scenario Bush maintained consistently throughout the ordeal:

Dr. Wright testified that this stab wound was not a fatal wound, that this woman died as a result of the gunshot wound that was inflicted by "Pig" Parker and not as a result of the stab wound.

(R. at 964).

[Bush's] statements show that this incident occurred as a result of "Pig" and Alphonso Cave abducting, robbing the victim in this case, Francis Julia Slater at gunpoint, robbing her at gunpoint, abducting her and taking her out of the store, putting her in Bush's car.... [T]he weapons were in the possession of Parker. Parker had the gun.

(R. at 969).

After she fell, Parker took the gun and shot her in the back of the head, the fatal wound. That was the murder. That was the homicide in this case.

(R. at 969-70).

There's no question from the evidence that this girl was shot by "Pig" Parker and I don't believe there is any question from the evidence that the weapons were wielded by Parker, and wielded by Cave. Bush did admit that he stabbed the girl, but there is no doubt from the evidence that the stab wound was not fatal.

(R. at 970).

It was after Muschott made these statements that the prosecutors made the assertion about which Bush now complains. It was made during Mr. Midelas's explanation of the state's felony murder argument. (R. at 992). Upon conclusion of Mr. Midelas's argument, Mr. Muschott asked the jury:

What do you think would have happened to that girl in the hands of Parker and Cave if Bush had not driven that car away from that location? Buying time, hoping in vain somehow this situation would resolve itself. It didn't. It resolved itself by "Pig" Parker shooting this girl in the back of the head, not in response to anything Mr. Bush said, not in response to anything Mr. Bush did, but in response to "Pig" Parker's robbery, in response to "Pig" Parker's and Cave's abduction of the girl and in response to "Pig" Parker's knowing that the girl could identify him.

(R. at 1003).

Based on the lack of any evidence to contradict Bush's own statements as to the role he played in Slater's murder, the lack of any evidence suggesting that he shot Slater, the prosecutor's reliance on the felony-murder argument and insistence that he did not have to prove that Bush even touched Slater, the context in

which the questionable statement was made, Muschott's arguments to the jury, the judge's instructions to the jury regarding felony murder, the judge's express finding that no evidence implicated Bush as the shooter, and, finally, the lack of any evidence to show that the prosecutors admitted and relied on evidence they knew to be false, the Court finds there is no reasonable likelihood that the questionable comment made by the prosecutor could have affected the judgment of the jury at the guilt/innocence or the sentencing phase of Mr. Bush's trial.

The only relevant evidence added during the sentencing phase was that proffered by Mr. Bush himself.²³ This was consistent with Bush's prior statements to the effect that Parker had shot Slater. The prosecution made no further comments regarding who pulled the trigger, and Muschott simply repeated what he and Bush had maintained all along. (R. at 1283). Since the state did not use false evidence against Mr. Bush nor seek to hide exculpatory evidence from him; and since the prosecutor's one statement suggesting that Bush fired the weapon was not material, Claim VI is denied.

CLAIM VII

THE PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS BECAUSE THE FLORIDA SUPREME COURT REFUSED TO REVIEW CERTAIN OF HIS CLAIMS THE COURT FOUND PROCEDURALLY BARRED.

The petitioner claims that his prosecutors conspired to conceal evidence from him and that, once the evidence surfaced, the

²³The prosecution attempted to introduce a statement by Parker to the effect that Bush had shot Ms. Slater, but Mr. Muschott successfully objected to its introduction and it was not presented to the jury. (R. at 1166-71).

Florida Supreme Court refused to consider it since petitioner had not presented it on direct appeal. Petition, at 175-88. A review of the record reveals the Florida Supreme Court refused to consider four claims the petitioner raised on collateral attack but which the court found to be procedurally barred.²⁴ The only one dealing with the suppression of evidence was Claim IV (of the collateral attack) which the trial judge considered and dismissed on its merits: Petitioner claimed: "THE STATE MATERIALLY MISLED THE JURY BY PRESENTING AND ARGUING FACTS WHICH IT KNEW TO BE FALSE, AND WHICH TOTALLY CONTRADICTED THE PROSECUTOR'S THEORY IN CO-DEFENDANTS' CASES, IN VIOLATION OF DEFENDANT'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS." See Initial Brief of Appellant, State Court Collateral Proceedings, at ii. Specifically, the petitioner claimed the prosecution implicated him as the shooter before the jury when there was no evidence whatsoever to suggest that he had pulled the trigger. To solidify its argument, the prosecutors informed Bush's jury of the .38 caliber bullet found in the front seat of his car but hid from the jury a forensics report which concluded that the victim had been killed by a .32 caliber weapon. This is precisely the argument raised in CLAIM VI, above. See also Claim I, ground (c). Because this Court considered the claim on its merits and decided that it is meritless, it need not address the Florida Supreme Court's determination that the claim was procedurally barred. See Wainwright v. Sykes, 433 U.S. 72 (1977); Smith v. Murray, 477 U.S. ___, 106 S.Ct. 2662, 91 L.Ed.2d 434

²⁴The four claims are enumerated in footnote 2 above.

(1986); Murray v. Carrier, 477 U.S. ___, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

CLAIM VIII

THE PETITIONER WAS DENIED HIS RIGHT TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION BECAUSE THE STATE INTENTIONALLY RELIED UPON VICTIM IMPACT, COMPARABLE WORTH, AND OTHER IMPROPER FACTORS IN ITS EFFORTS TO OBTAIN A SENTENCE OF DEATH.

The petitioner claims the prosecutors referred to the victim's family during voir dire and in closing argument in a manner forbidden by the U.S. Supreme Court's decision in Booth v. Maryland, 482 U.S. 496 (1986). He alleges that his prosecutors elicited sympathy from the jury by express references to Francis Slater's family and to the effect her murder had on them. During voir dire, the prosecutors directed the following inquiries at the jury panel:

The fact that the victim in this case may be a person who is somewhat famous in the fact that she is the granddaughter of a famous person, Frances Langford, and of course, Ralph Evinrude, would that in anyway effect you in rendering your verdict in this case? Would you tend to give this man any less of a fair trial?

Now the victim's parents are Richard and Salli Campbell from Jenson Beach. Mr. Campbell is in the newspaper business there. They are seated in the courtroom and they will be here throughout the trial. They are seated over on the back row. Mr. and Mrs. Campbell back there.

Now, the fact that they may be here during the course of this trial and the victim in this case was their daughter and you will see them at recess and during breaks, would that cause you to in anyway have any effect whatsoever on your verdict in this case? You would listen to the evidence and that law only and not who the victim is or who she's related to. Could each of you do that? Would any of you have any problem with that whatsoever?

(R. at 32-33). The prosecutors made four more similar statements

throughout the course of voir dire and during arguments before the jury. (R. at 59, 214, 278 and 315).

During opening argument for the guilt phase, the prosecutor stated that "she [Slater] was shot in the back of the head with a fatal wound. Just two days before her 19th birthday." (R. at 332). During closing argument of the guilt phase, he explained:

[O]n Monday night, April 26th, at approximately ten o'clock, Bush and his gang were sitting in Fort Pierce drinking, planning to rob. And Frances Slater was at home with her twin sister watching television. That shortly thereafter, the Bush gang left Fort Pierce with the intent to rob and drove to Stuart, and about 10:40 arrived at the Little Saints Store in Stuart. Frances Slater was lying on the carpet in front of the television, watching TV.

(R. at 973). Later in the argument, he added:

Now, Mr. Stone and I do not represent the Campbell family. It was their daughter who was killed. We represent the State of Florida. What this defendant did on the night of April 26th, the early morning hours of April 27th is a crime against all of the people of the State of Florida and that's who Mr. Stone and I represent.

(R. at 998). Finally, during the closing argument at the sentencing phase, the prosecutor argued:

I know its natural to have sympathy in situations like this. I don't think there is any question about that. I think certainly you have heard the evidence in this of the previous trial and we talked about sympathy at that point.

* * *

But I submit to you that sympathy, I sympathize with John Earl Bush, anybody would sympathize with John Earl Bush when he is being faced with something like this, but nevertheless, John Earl Bush put himself here. I didn't put him here, you didn't put him here. And you have taken an oath that as a juror you will base your advisory sentence on what you heard in this trial and not on sympathy, because I asked you don't consider the sympathy that Mr. and Mrs. Campbell have. Don't consider that

when Mr. and Mrs. Campbell sit down to Thanksgiving dinner just three days from now that they are going to look across the table and they are going to look at Cathy and they are going to see Frances Julia Slater, the identical twin sister. If sympathy had any part in it, think of what they go through. And every time they sit down and look at her, this whole incident is going to come back...

(R. at 1279-80).

In Booth, the Supreme Court addressed the constitutionality of a Maryland statute that required consideration of a presentence investigation containing a "victim impact statement" during the sentencing process in all felony cases. The victim impact statement described in detail the effect of the crime on the victims and families based on information supplied by the victims and their families. The statements contained basically two types of information: (1) the personal characteristics of the victims and the emotional impact of the crime on their families, and (2) family members' comments and opinions regarding the outstanding personal qualities of the victim, the serious emotional problems suffered by the family, and the family members' perceptions of the crime, i.e. that their parents were "butchered like animals."

The Supreme Court found that the formal presentation of such information to a capital sentencing jury could "serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. at 508. The Court concluded that admission of such information created an unacceptable risk that a jury might impose a death sentence in an arbitrary and capricious manner thereby undermining the reasoned decisionmaking required in capital sentencing

cases. Id. at 508-9. For this reason, the Court held that the introduction of the victim impact statement at the sentencing phase of trial violated the eighth amendment.

The Supreme Court revisited Booth recently in South Carolina v. Gathers, ___ U.S. ___, 57 U.S.L.W. 4629 (June 12, 1989). In Gathers, the prosecutor read to the sentencing jury extensive portions of a religious tract found in the victim's possession. The prosecution also made reference to the victim's voter registration card in effort to paint him as a patriotic American. The Supreme Court affirmed the South Carolina Supreme Court's determination that this line of argument violated Booth. It encouraged the jury to focus on factors unknown to the defendant, irrelevant to the offense and which were offered, primarily, to diminish the worth of the defendant in light of that of the victim.

Upon review of the record in this case, the Court finds that prosecutorial comments did not violate Booth or Gathers. The comments made during voir dire or the guilt phase of the trial did not involve Booth information. All of the questions asked during voir dire related solely to the identity of the victim and her family--information that would have, and did, come out at trial. Booth does not purport to preclude a prosecutor from determining whether the jurors would be prejudiced knowing the case involved a well-known family. This inquiry was necessary and proper to assure that the defendant obtained a fair trial. Prosecutorial reference, during the sentencing phase, to the pain felt by the victim's family did not rise to the level of a Booth violation in this case

either. Comparing the victim impact statement presented to the jury in Booth and the statements read to the jury in Gathers with the single comment made by the prosecutor in this case, the Court finds a material difference in the scope of the information provided and the likely effect of the information on the respective juries. The victim impact statement in Booth contained extensive and emotionally charged details about the family and the victim and about each of their reactions to the crime. The passages read to the jury in Gathers were prayer-like invocations, requests for humility and strength with which to weather the storms God allowed in the lives of the insignificant. Some jurors may have even found the passages poetic.

In comparison, Bush's prosecutor made a single comment during the close of his argument in reference to the family's loss. The jury was already fully aware of that loss--fully aware that Francis Slater would be missed during the upcoming Thanksgiving holiday. The prosecutor added nothing to its knowledge; he did not attempt to compare the "worth" of the victim with that of the defendant; he did not inform the jury of irrelevant facts about the victim's accomplishments, dreams or desires; he did not read to them specific statements from family members about what the loss of the victim meant to them. In short, he did not create the risk that the petitioner's death sentence was based on constitutionally impermissible or irrelevant considerations in violation of the eighth amendment. Bush's sentence was directly related to his culpability

in the offense. The prosecutor did not violate Booth. Accordingly, Claim VIII is denied.

CLAIM IX

THE PETITIONER WAS DEPRIVED OF EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY PROSECUTORIAL COMMENTS AND JUDICIAL INSTRUCTIONS WHICH DIMINISHED THE JURORS SENSE OF RESPONSIBILITY DURING THE SENTENCING PHASE OF HIS TRIAL.

The petitioner claims that the jury was misled about its proper role in the sentencing phase in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Petition, at 199-206. In Caldwell, the United States Supreme Court held that prosecutorial remarks which misinformed the jury as to the role of appellate review in a capital case violated the eighth amendment. Id. at 336, 105 S.Ct. at 2643 (plurality); id. at 341-42, 105 S.Ct. at 2646 (O'Connor, J., concurring in part and concurring in judgment). In the instant case, the petitioner faults his prosecutors for informing the jury that its role in the sentencing phase was "advisory," (Petition, at 201-202), that reasonable doubt was a guilt/innocence standard which played no part in the sentencing phase (Petition, at 202), that the advice was to be given without sympathy, (Petition, at 203), and that the final responsibility for imposing sentence rested with the judge, (Petition, at 203-04). Petitioner's claim is procedurally barred pursuant to Dugger v. Adams, 109 S.Ct. 1211 (1989) which dealt with the following facts.

In October of 1978, Audrey Dennis Adams, Jr. was convicted of first-degree murder by a Florida jury which recommended that he be sentenced to death. The death sentence was imposed and affirmed on

direct appeal by the Florida Supreme Court. Adams v. State, 412 So.2d 850 (Fla. 1982). The United States Supreme Court denied certiorari. 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). The trial court subsequently denied Adams' first motion for post-conviction relief pursuant to Fla.R.Cr.P. 3.850, and the Florida Supreme Court affirmed. Adams v. State, 456 So. 2d 888 (1984). Adams filed a federal habeas petition which the district court denied on September 18, 1984. Adams v. Wainwright, No. 84-170-Civ-Oc-16 (M.D. Fla.). The Eleventh Circuit affirmed, 764 F.2d 1356 (1985), and the U.S. Supreme Court denied certiorari again. 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed. 2d 805 (1986). Up to that time, Adams had not alleged that his judge or his prosecutor had done anything to diminish the jury's sense of responsibility regarding its sentencing recommendation.

In the meantime, however, the United States Supreme Court decided Caldwell. Adams filed a second 3.850 motion and alleged, for the first time, that his trial judge had violated Caldwell by instructing the jurors on numerous occasions that the sentencing responsibility was solely his and by failing to tell them that he could override their sentencing recommendation in limited circumstances only. Dugger v. Adams, 109 S.Ct. at 1214. The Florida Supreme Court refused to consider Adams' claim because it could have been raised on direct appeal and was therefore procedurally barred under Florida law. Adams v. State, 484 So.2d 1216, 1217, cert. denied, 475 U.S. 1103, 106 S.Ct. 1506, 89 L.Ed. 2d 906 (1986).

Adams filed a second federal habeas petition in which he asserted his Caldwell claim. The district court also found the claim to be procedurally barred and, in the alternative, ruled that it was meritless. Adams v. Wainwright, No. 86-64-Civ-Oc-16 (M.D. Fla., Mar. 7, 1986). The Eleventh Circuit reversed, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on denial of rehearing, 816 F.2d 1493 (1987) and held that Adams' Caldwell claim was not procedurally barred since it was novel at the time of his trial in 1978. The Court went on to consider the claim and ultimately granted the habeas petition on its merits. See Dugger v. Adams, 109 S.Ct. at 1214.

The United States Supreme Court reversed on the ground that Adams' claim was procedurally barred. Id. In summary, the Court reasoned as follows: a Caldwell violation arises when a jury is improperly instructed about its role under local law. Thus, to rule the way it did on the merits, the Eleventh Circuit must have concluded that the remarks in question were error under Florida law. Id. at 1215. To reach that conclusion, however, was to conclude that objections to those remarks existed at the time the remarks were made, i.e., they did not arise under some novel 1985 interpretation of the eighth amendment. Since Florida law bars a petitioner from raising claims which could have been but were not raised on direct appeal, Adams' Caldwell claim was procedurally barred. Id. at 1216. The conclusion to be gleaned is that state

law determines whether the issue is procedurally barred.²⁵ In the instant case, the Florida Supreme Court has already decided that Bush's Caldwell claim is procedurally barred. See Bush v. Wainwright, 505 So.2d 409, 410 (Fla. 1987). Accordingly, this Court will not consider it.

CLAIM X

PETITIONER'S STATEMENTS TO LAW ENFORCEMENT PERSONNEL WERE OBTAINED IN VIOLATION OF MIRANDA V. ARIZONA AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Next, the petitioner claims that the four statements he gave to law enforcement officers were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). This is the same claim made and rejected during trial, and made and rejected on appeal.²⁶ Upon independent consideration, this Court reaches a conclusion identical to that reached twice below: the statements were voluntary. The facts surrounding those statements are as follows.

²⁵Indeed, this was already the case. In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) the Eleventh Circuit held that a Caldwell claim was not procedurally barred on a federal habeas review precisely because the state Supreme Court had arguably addressed the merits of such a claim in disposing of the petitioner's 3.850 motion [we "clearly and conclusively refute any claim that there was any constitutional infirmity in the trial." Mann v. State, 482 So.2d 1360, 1362 (Fla. 1986)]. The Eleventh Circuit reasoned, "[s]ince the Supreme Court of Florida chose not to enforce its own procedural default rule, federal habeas review of the claim is not barred." (cites omitted). Mann v. Dugger, 844 F.2d at 1448, n. 4.

²⁶The state courts' disposition of this issue is noted only because state court resolution of subsidiary factual questions are given a statutory presumption of correctness. See Agee v. White, 809 F.2d 1487, 1493 (11th Cir. 1987); Lightbourne v. Dugger, 829 F.2d 1012, 1018-19 (11th Cir. 1987).

At approximately 8:40 a.m. on May 4, 1982, Bush and his girlfriend, Georganna Williams, arrived at the Martin County Sheriff's Department to ask about a car (belonging to Bush) which had been seized by the Department. While there, Mr. Bush was approached by Detective Sergeant Lloyd Jones who asked Bush if he would talk to Detective Holt and three other officers about the murder of one Francis Slater. (R. at 619). Bush agreed and was taken to an interrogation room. He was not placed under arrest at the time. Prior to asking Bush any questions, however, the officers told him that they were investigating the murder. The officers then informed Bush of his Miranda rights with the aid of an "interrogation advice of rights form." They read the form to him and then had him read his rights out loud; they asked him if he understood all of his rights, and asked if he was under the influence of alcohol or drugs. The petitioner indicated that he understood his rights; then he signed the waiver form. (R. at 686-89).

This first interview lasted approximately one and one-half hours. During that time, the petitioner denied any involvement in the murder and claimed he had gone to West Palm Beach that night to visit one Robert Lee Wilson to find out about a job. The officers suggested that the petitioner accompany them to West Palm Beach to find Mr. Wilson and verify the petitioner's story. The petitioner expressed his willingness to go. (R. at 728-29).

After conclusion of the first statement, the officers asked Bush if he was willing to take a polygraph test. He said he was. He was taken to the polygraph suite of the Sheriff's department

where he was turned over to Det. Kelly Vaughn. Immediately upon entering the suite, Vaughn took Bush through a "participating Miranda" form. Bush was informed of his rights a second time, both orally and in writing. The petitioner then signed the Miranda form along with another form authorizing the polygraph test. See Deposition of Det. Vaughn, Appendix VVV, p. 18-19. Preparation for the actual test took approximately two hours. Id. at 11. Just prior to the start of the test, Bush said "maybe I should talk to an attorney." Before Det. Vaughn could respond to this statement, Bush continued, "no, I just want to talk to my sister." Then, almost in the same breath, the petitioner said, "Well, I'm already here so let's get this over with." Id. at 13. Det. Vaughn then administered the test.

After completion of the polygraph test, the officers again asked the petitioner if he was willing to go to West Palm Beach even though he had no obligation to do so. (R. at 631-32). Bush volunteered to go. (R. at 632). Detective Sergeant Charles Jones and Deputy McClain took petitioner to West Palm Beach. Shortly after arriving, the officers located Mr. Wilson's home but Wilson was not there. They decided to await his return. After a few minutes, Bush told the officers there was no need for them to wait any longer because Wilson had no knowledge of what had happened. At 7:35 p.m., Bush gave his second statement, this time to Officers Jones and McClain. Prior to taking the statement in West Palm, Officer Jones asked Bush whether he was giving the statement voluntarily, whether he had been read his rights, and whether he under-

stood them. Bush answered "yes" to each question. (R. at 749). He was asked twice more during the course of the interview whether his statements were offered voluntarily. (R. at 752, 757). Bush responded in the affirmative. In the second statement, Bush confessed his involvement in the Slater murder. The officers returned to the Martin County Sheriff's Department.

At about 9:20 p.m. on that same night, Bush gave a third statement to Det. Jones and Deputy McClain. Prior to taking the third statement, Det. Jones again utilized an interrogation form to Mirandize the petitioner. Det. Jones read Bush his rights and the information provided on the waiver form, asked Bush if he understood what was read, and asked him again if he was giving the statement voluntarily. Bush signed the waiver form and stated that he understood his rights and was voluntarily giving the statement. (R. at 761-63). He confessed to his involvement in the murder a second time. Following the third statement, Bush was incarcerated in the county detention center.

He gave his fourth statement on May 7, 1982. On this date Bush notified Art James Jackson, the administrator for the Martin County Sheriff's Department, that he wanted to see Sheriff Holt. (R. at 794). Mr. Jackson contacted Sheriff Holt who went to the jail. (R. at 796). The petitioner told the Sheriff that he was being accused of something and wanted to tell his part to get it straight. (R. at 797). The Sheriff told Bush that he could not talk to him because he, Bush, was not represented by an attorney. The petitioner said he still wished to talk and he directed the

sheriff to call his attorney, Mr. Schopp. Mr. Bush spoke with Mr. Schopp on the phone and then allowed Sheriff Holt to talk with him (Schopp). (R. at 652). Mr. Schopp informed the Sheriff that he had advised Bush not to talk but that Bush had indicated that he was going to talk anyway. (R. at 654-55). The Sheriff then directed Lieutenant David Powers to take Bush's statement. (R. at 655). Lt. Powers spoke with Schopp as well. (R. at 659).

Lt. Powers took Bush to his office in the Detective Bureau and prepared a waiver of rights form. (R. at 660). Prior to giving the statement, Bush was read his rights again. Bush read the form; indicated he understood what it meant, and then signed it. (R. at 660-61). Bush was informed of his rights yet another time when Lt. Powers began recording his statement. (R. at 803). Lt. Powers even told Bush that his attorney recommended he not talk with anybody, and asked Bush once again whether he was sure he wanted to make another statement. (R. at 811-12). Bush said "yes," and gave his fourth statement to Lt. Powers.

The petitioner challenges the use of the four statements at trial on two grounds. First, he argues that he waived his Miranda rights involuntarily. Second, he claims that officers failed to honor his invocation of the right to counsel prior to administration of the polygraph test and therefore all subsequent statements should have been excluded from evidence.

A voluntary statement is one given by a defendant who has made an "independent and informed choice of his own free will, [while] possessing the capability to do so, his will not being overborne by

the pressures and circumstances swirling around him." Singleton v. Thigpen, 847 F.2d 668, 670 (11th Cir. 1988) quoting Jurek v. Estelle, 623 F.2d 929, 937 (5th Cir. 1980). On habeas review, the burden of proving involuntariness rests with the petitioner. Martin v. Wainwright, 770 F.2d 918, 925 (11th Cir. 1985). The Court must look to the totality of the circumstances surrounding the statements to determine whether the record supports a finding of involuntariness. Martin, 770 F.2d at 925; Jurek, 623 F.2d at 937. Also, in a federal habeas proceeding, a statutory presumption of correctness applies to "subsidiary factual questions" resolved in state court proceedings. Agee v. White, 809 F.2d 1487, 1493 (11th Cir. 1987). A federal court is to give great weight to the conclusions of a coequal state judiciary, even if the decisions are not binding. Lightbourne v. Dugger, 829 F.2d 1012, 1018-19 (11th Cir. 1987).

Initially, the Court notes that officers read the petitioner his full Miranda rights three different times on May 4. Additionally, the petitioner was reminded of his rights prior to making the second statement. On May 7, the petitioner was read his rights two times and was allowed to talk with his attorney before making his statement. Not once during any of the statements did he indicate he was having trouble understanding the officers or any of his rights. Instead, the petitioner indicated that he understood his rights each time they were read to him, and that the statements he made were voluntary. He signed four waiver forms.

The petitioner argues that, despite all of the warnings, he is so mentally and psychologically deficient that "interrogation" techniques utilized by the officers resulted in the involuntary relinquishment of his right to remain silent. In support of this argument, the petitioner offers the report of Dr. Carbonell. Dr. Carbonell concludes that Bush's limited intellectual functioning, significant deficits in verbal skills, and inability to deal with verbal information, make it improbable that he willingly, knowingly, or intelligently waived his rights. While the mental state of a defendant can be a significant factor in the voluntariness calculus, this factor by itself is insufficient to make an otherwise proper waiver involuntary. See Colorado v. Connelly, 479 U.S. 157, 164 (1986); Singleton, 847 F.2d at 670; United States v. Scheigert, 809 F.2d 1532 (11th Cir. 1987). "Rather, 'coercive police activity is a necessary predicate' to a finding that the [waiver] by a person with a low intelligence level is ⁱⁿvoluntary." Singleton, 847 F.2d at 671 quoting Connelly, 479 U.S. at 167; see also Scheigert, 809 F.2d at 1533. Carbonell's conclusions were reached more than five years after the fact; they are belied by the record and are arguably undermined by the conclusions of D'Amato.

The record in this case is void of any police activity that this Court can classify as unduly coercive. The petitioner argues that comments such as "we're coming on strong," "we wouldn't be at this point if we didn't have something," "only one person pulled the trigger," "if you're not the one who pulled the trigger, that's in your favor," "it's time to come clean," "we know you ain't the

one that pulled the trigger," etc., should be considered coercive because they were designed to override the petitioner's free will. The Court cannot agree.

First, there is nothing in the record to indicate that Bush's will was ever overridden or that the officers had any indication of his alleged mental incapacity. Bush was responsive and appeared to understand everything that was going on. He initiated much of it. The officers had no reason to coerce Bush's statements because he was so eager to provide them, to "get things straight." Far from an "overridden will," petitioner's actions (i.e., continual denials and his attempt to fabricate an alibi) attest to his ability to think for himself and to assert himself in a stressful situation. Upon a careful review of the record, the Court finds absolutely nothing improper about the way in which Bush was interrogated. This finding is consistent with that reached by the trial court and the Florida Supreme Court. See Bush v. State, 461 So.2d 936 (Fla. 1984); see also Paramore v. State, 229 So.2d 855, 858 (Fla. 1969); and La Pocca v. State, 401 So.2d 866, 868 (Fla. 3d DCA 1981). Absent improper actions by the officers, Bush's limited intellectual capacity alone does not render his waivers involuntary. Singleton, 847 F.2d at 670. Accordingly, the Court finds that Bush voluntarily waived his Miranda rights.

Bush's second objection is that he invoked his right to counsel prior to undergoing the polygraph test and therefore no subsequent statements should have been admitted into evidence. As the

former Fifth Circuit explained in Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979):

[W]hen even an equivocal request for an attorney is made by a suspect during a custodial interrogation, the scope of that interrogation is immediately limited to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified And no statement taken after that request is made and before it is clarified ... can clear the Miranda bar (emphasis added).

Id. at 771-72. However the word "attorney" does not have a talismanic quality which prevents further questioning once spoken by a defendant. See Id. at 772. Once a defendant's request is clarified, the interrogation may continue if the defendant wishes to continue without the aid of counsel. See Nash v. Estelle, 597 F.2d 768 (5th Cir. 1979).

Here, the petitioner's statement needed no further clarification. Initially, Bush voiced an equivocal desire for counsel which he immediately withdrew. He clearly expressed his desire to proceed with the polygraph. The Court finds that Bush clarified his own intentions and there was no need for Det. Vaughn to seek further clarification. Vaughn did not violate Miranda by continuing with the test. Claim X is denied.

CLAIM XI

THE PETITIONER WAS DEPRIVED OF EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY JUDICIAL INSTRUCTION WHICH MAY HAVE MISLEAD THE JURY INTO THINKING THAT IT HAD TO REACH A MAJORITY RECOMMENDATION REGARDING SENTENCING.

The petitioner claims that the jury was lead to believe that it could not return with a vote evenly split between recommending life and recommending death. Petition, at 213-223. Although the

defense did not object, at trial, to the statements with which it now contends, those contentions were raised before and dismissed by the Florida Supreme Court on direct appeal. See Bush v. State, 461 So.2d at 941.²⁷ In any event, they are without merit. After advising the jury that its decision did not have to be unanimous but "may be made by a majority," the trial judge clarified his instruction:

Now, if the majority of the jury determines that John Earl Bush should be sentenced to death, your advisory sentence will be 'a majority of the jury by a vote of blank advises and recommends to the court that it impose the death penalty upon John Earl Bush.' One the other hand, if by six or more votes the jury determines that John Earl Bush should not be sentenced to death, your advisory sentence will be 'the jury advises and recommends to the court that it impose a [life sentence].'

(R. at 1290) (emphasis added). Even so, petitioner has failed to demonstrate that his jury was confused or split six to six, and thus he has failed to carry his burden of showing prejudice in the instructions. See Adams v. Wainwright, 764 F.2d 1356, 1369 (11th Cir. 1985); Henry v. Wainwright, 743 F.2d 761, 763 (11th Cir. 1984). Upon this Court's independent consideration of the issue, Claim XI is denied.

²⁷The Court notes the state court rulings for the effect they have on deciding whether the claim is procedurally barred. See Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). Since the Florida Supreme Court considered the claim on its merits, this Court did also.

CLAIM XII

THE PROSECUTION'S VIOLATION OF STATE DISCOVERY RULES VIOLATED PETITIONER'S DUE PROCESS RIGHTS, HIS RIGHT TO A FAIR TRIAL, AND HIS RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES AGAINST HIM, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The petitioner claims an investigator's testimony contradicted an earlier deposition and therefore he, Bush, was entitled to a mistrial or at least a hearing pursuant to Richardson v. State, 246 So.2d 1149, 1151 (Fla. 1979). The trial judge granted neither and Bush claimed error. The Florida Supreme Court considered and rejected this precise claim on direct appeal. Bush raises it again.

On July 22, 1982, defense counsel took the deposition of Detective John Forte. Forte testified that he had taken a statement from a Ms. Charlotte Gray who had seen the defendant the night of the murder. After giving a brief description of what Ms. Gray had reported, Forte was asked the following:

Q: Okay. Was a photo lineup also conducted with Ms. Gray?

Forte: Yes there was.

Q: Okay, and was she able to make any identification of any of the defendants?

Forte: No ma'am.

Deposition of Detective Forte, p.10. See Supplemental Record from direct appeal to the Florida Supreme Court. Later in the deposition, Forte was asked:

Q: And being the detective involved and having investigated the matter fully, do you have any evidence which would indicate that the individuals who came into Charlotte Gray's store are the same individuals who are charged with the murder of Frances Slater?

Forte: No, I don't.

Id. at 21. Finally, Forte was asked once again:

Q: ...[W]as Charlotte Gray shown any photographs at any time that you're aware of?

Forte: I believe she was.

Q: And do you know whose photographs they were?

Forte: Off hand I can't remember, sir--off hand I can't recall.

Q: Were you present when she was shown the photographs?

Forte: Yes.

Q: Was she able to identify any of the photographs?

Forte: No.

On August 31, 1982, Ms. Gray's deposition was taken. Ms. Gray testified that she was able to identify one picture from the photo line-up because it looked just like one of the persons, who was in her store. See Supplemental Record for first appeal to the Florida Supreme Court, Deposition of Charlotte Gray, p. 29. However, she could not identify which of the two people it was, id. at 30; she said she was pretty sure regarding her identification, although she would not stake her life on it. Id. at 31.

At trial, Gray testified that she had not been able to identify any one in a live line up, but had been able to identify someone from a photo line-up. (R. at 485, 491). The state then called Detective Forte who testified that Ms. Gray had picked Bush's picture out of a line-up of twenty-four pictures. (R. at 507D). During cross examination, the defense attorney went through Forte's deposition pointing out where Forte testified that Ms. Gray had not

been able to identify any of the photographs. (R. at 507K). On redirect, Forte explained that the inconsistency in his testimony arose because the defense attorney had asked different questions at trial and during the deposition.

The petitioner argues that Detective Forte's misleading deposition testimony and the prosecution's failure to disclose Gray's positive identification of Bush violated the discovery rules set forth in the Florida Rules of Criminal Procedure. Furthermore, the petitioner contends that the trial court erred by failing to conduct an inquiry into the matter to determine appropriate sanctions for the violations in accordance with Richardson v. State, 246 So.2d 771 (Fla. 1977). On direct appeal, the Florida Supreme Court found these arguments to be without merit holding that Detective Forte and the prosecution did not violate Florida's discovery rules. Bush v. State, 461 So.2d at 938.

The issues raised in this claim are questions of state law. The proper inquiry when a federal court reviews a state court conviction is whether the alleged misconduct violated due process by rendering the petitioner's trial fundamentally unfair. See Walker v. Davis, 840 F.2d 834 (11th Cir. 1988); Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984). Here, the petitioner's counsel was aware of the identification prior to trial despite Det. Forte's deposition testimony. Gray testified twice at her deposition that she identified a picture during the photo line-up. Petitioner's counsel attended Ms. Gray's deposition. Additionally, counsel was allowed to cross-examine both Ms. Gray and Det. Forte about the

identification. In fact, counsel confronted Det. Forte with the inconsistencies in his testimony. Upon due consideration, the Court finds that the alleged misconduct did not render the trial fundamentally unfair and did not rise to the level of a constitutional violation. Accordingly, Claim XII is denied.

CLAIM XIII

THE PETITIONER WAS DEPRIVED OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY THE PROSECUTOR'S USE OF HYPNOTICALLY INDUCED TESTIMONY AT TRIAL.

The petitioner claims that he was deprived of the right to cross-examine Danielle Symons, a state witness who identified Bush as one of the men in the convenience store on the night of the abduction, because Symons' testimony had been hypnotically refreshed. Petition, at 223-227. This issue was not raised on direct appeal and is therefore procedurally barred under Florida law. See e.g., Kennedy v. State, ___ So.2d ___ (Fla. June 8, 1989); O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984). Even though petitioner's failure to raise this claim before the state courts has precluded their express finding that it is procedurally barred, this Court is bound by the state's rules of procedure and not just by its specific procedural rulings. Lindsey v. Smith, 820 F.2d 1137, 1143 (11th Cir. 1987). Moreover, Miss Symons' testimony was not prejudicial. See Claim I (d) above. Claim XIII is therefore denied.

CLAIM XIV

PETITIONER'S EIGHTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION WERE VIOLATED BY THE IMPROPER INTRODUCTION OF INFLAMMATORY AND PREJUDICIAL PHOTOGRAPHS AT HIS CAPITAL TRIAL.

The petitioner argues that his trial was fundamentally unfair because photographs of his victim's body were admitted into evidence during the guilt phase of his trial. This claim was also raised before and rejected by the Florida Supreme Court. Federal courts possess limited authority to review state court evidentiary rulings in habeas corpus actions. Hall, 733 F.2d at 770. Generally, a federal court will not review a trial court's actions with respect to the admission of evidence. Id. at 770. A petitioner will be granted relief based on a state evidentiary ruling only when the violation results in the denial of fundamental fairness. Id. at 770. Specifically, the admission of prejudicial evidence justifies relief only when "the evidence 'is material in the sense of a crucial, critical, highly significant factor.'" Nettles v. Wainwright, 677 F.2d 410, 415 (5th Cir. Unit B 1982) quoting Hill v. Henderson, 529 F.2d 397, 401 (5th Cir. 1973).

In the case at bar, the photographs were relevant and properly introduced under Florida law. See Bush v. State, 461 So.2d 936, 939 (Fla. 1984); Williams v. State, 228 So.2d 377 (Fla. 1969). They are not so inflammatory or gruesome as to deprive the petitioner of a fair trial. Nor were they a crucial, critical or highly significant factor in the petitioner's trial. Accordingly, the Court finds that the petitioner's trial was not rendered fun-

damentally unfair by the introduction of the photographs and Claim XIV is denied.

CLAIM XV

BUSH WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHTS BY THE PROSECUTOR'S INTRODUCTION INTO EVIDENCE THE RESULTS OF A POST-ARRAIGNMENT LINE-UP CONDUCTED BEFORE BUSH HAD BEEN APPOINTED COUNSEL AND HIS APPELLATE COUNSEL WAS INEFFECTIVE IN NOT RAISING THIS ISSUE ON APPEAL.

The petitioner claims he participated in a lineup after his right to counsel had attached but before he had been provided an attorney. Petition at 230-34. Since the issue is now procedurally barred under Florida law, see e.g., Kennedy v. State, ___ So.2d ___ (Fla. June 8, 1989); O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984); it appears petitioner is pursuing the claim that his appellate counsel was constitutionally ineffective in not raising the lineup issue on direct appeal. However, it is difficult to argue, as Mr. Bush's current counsel does, that the introduction of evidence regarding Bush's identification in the lineup was at all prejudicial. The lineup took place on May 12, 1982--5 days after Bush had given four voluntary statements to the police. At trial, Danielle Symons testified that she was at the lineup and that she had identified Mr. Bush as the man she had seen at the convenience store on the night of the murder. Bush admitted as much and more in three of his four voluntary statements. Moreover, Bush's trial counsel did object to the admission of the lineup results on the ground that waiver of counsel was a necessary predicate. (R. at 364). The trial court overruled the objection since the right to counsel had not attached prior to May 20, 1982 (the

day Bush was indicted). The manifest lack of prejudice in appellate counsel's "failure" to argue this issue on appeal precludes any Strickland violation. While Bush's current counsel may choose his own strategy, he cannot properly fault a former counsel for "failing" to litigate on appeal any and every "appellate-type" issue which may have occurred to him regardless of how frivolous. Claim XV is denied.

CLAIM XVI

THE PETITIONER'S EIGHTH AMENDMENT RIGHTS WERE VIOLATED BY THE SENTENCING COURTS REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

Next, the petitioner contends that the trial court's failure to find the presence of any mitigating circumstances violated the eighth amendment. The finding of mitigating circumstances during the penalty phase of the trial is a factual determination subject to review under Title 28 U.S.C. §2254(d). This statute creates a presumption of correctness for factual findings by an appropriate state court. See Sumner v. Mata, 449 U.S. 539 (1981). Pursuant to this presumption, the factual findings of the state court shall not be disturbed unless they are not fairly supported by the evidence. See Magwood v. Smith, 791 F.2d 1438, 1448 (11th Cir. 1986).

In the case at bar, the petitioner argues that the trial court erred by not finding the following mitigating circumstances:

- (a) That Bush was an accomplice in the capital felony committed by another person and his participation was relatively minor,
- (b) that Bush was intoxicated at the time of the offense,

(c) that Bush was remorseful and confessed to the crime, and

(d) that the victim was not sexually assaulted.

The first circumstance listed by the petitioner is a statutory mitigating factor. See F.S. §921.141(6)(d). Upon review of the record, this Court finds that the trial court's refusal to find this factor present is supported by the evidence. Bush's argument that the separate requirements of this factor should be viewed independently is unpersuasive. The clear language of the statute requires that Bush be an accomplice in the crime, that another person commit the capital felony, and that Bush's role in the crime be relatively minor before this mitigating factor applies. There was substantial evidence presented at trial that Bush's role in the crime was far from minor.

The final three mitigating circumstances cited by Bush are nonstatutory mitigating factors. As recognized by the trial court, neither a jury nor a court are bound by the statutory mitigating factors and each may consider anything in mitigation of the petitioner's sentence. See Lockett v. Ohio, ___ U.S. ___ (1978). Here, the trial court found the record "totally void of anything that may be said in [Bush's] behalf," (R. at 1307), thus rejecting the three nonstatutory factors presented in the petition. This court cannot say that the trial court's finding was erroneous.

The trial record reveals very little testimony concerning Bush's remorse. In fact, petitioners counsel testified at the evidentiary hearing that Bush was very cold and unremorseful.

(H. at 355). Additionally, as discussed in Claim I above, the record reveals sufficient evidence to find that Bush was not so intoxicated at the time of the crimes as to diminish his role in the murder or his capacity to formulate a specific intent.

Finally, the fact that Mr. Bush and his co-defendants did not sexually assault Ms. Slater is hardly the type of mitigating evidence of which the court is required to take notice and for which it is required to express appreciation. Parker, Cave, Johnson and Bush robbed, kidnapped and murdered their victim in cold blood. This Court will not require another to be more lenient with them because they did not sexually assault her or perpetrate any number of other atrocities against her person. For the reasons stated above, this Court finds that the trial court's factual findings regarding mitigating factors are supported by substantial evidence. Accordingly, Claim XVI is denied.

CLAIM XVII

BUSH WAS DEPRIVED OF RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY PROSECUTORIAL AND JUDICIAL "BURDEN-SHIFTING" DURING THE SENTENCING PHASE OF HIS TRIAL.

Bush claims that his jury was instructed that he bore the burden of proof on the issue of whether he should live or die, while Florida law places that burden on the state. Petition, at 239-44. See Arango v. State, 411 So.2d 172, 174 (Fla. 1982); and Sandstrom v. Montana, 442 U.S. 510 (1979). He did not object to the instructions given or comments made at trial and he failed to raise his current claim on direct appeal. That failure renders the claim procedurally barred under Florida law. See Porter v.

State, 478 So.2d 33 (Fla. 1985); O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Lindsey v. Smith, 820 F.2d 1137, 1143 (11th Cir. 1987). Claim XVII is denied.

In conclusion, and after careful consideration of each of the claims raised herein; the Court finds that the petition for federal habeas corpus filed on behalf of the defendant petitioner John Earl Bush is without merit, and the same is hereby DENIED.

DONE AND ORDERED in Chambers in Tampa, Florida this 7TH day of August, 1989.


UNITED STATES DISTRICT JUDGE

ORIG.

CASE NO. 93-6431

Supreme Court, U.S.
FILED
NOV 18 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

JOHN EARL BUSH,

Petitioner,

vs.

HARRY K. SINGLETARY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

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WHETHER THE ELEVENTH CIRCUIT'S
AFFIRMANCE OF THE STATE COURT "ENMUND
FINDINGS" IS IN CONFLICT WITH THIS
COURT'S PRECEDENT

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<u>Kotteakos v. United States</u> , 328 U.S. 750 (1946).....	10
<u>Lockhart v. Fretwell</u> , 506 U.S. ___, 122 L. Ed. 2d 180, 189, 113 S. Ct. ___ (1993).....	14
<u>McKoy v. North Carolina v. Mississippi</u> , 472 U.S. 320 (1985)...	8
<u>Mills v. Maryland</u> , 486 U.S. 367 (1988).....	8
<u>Strickland v. Washington</u> , 466 U.S.. 668 (1984).....	12
<u>Tison v. Arizona</u> , 481 U.S. 137 (1987).....	2

OPINION BELOW

The state notes that the opinion below has been reported as Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993). All other prior opinions are included in petitioner's appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's statement regarding the pertinent provisions.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent rejects petitioner's statement of the case. The statement is an editorial replete with slanted facts. The Eleventh Circuit's opinion, attached as an appendix to petitioner's petition contains an accurate account of the procedural history, the facts adduced at trial and the findings of fact made by the district court. Bush v. Singletary, 988 F. 2d 1082. (11th Cir. 1993). Respondent's appendix contains the testimony of trial counsel, which was presented at the federal evidentiary hearing.

REASONS FOR DENYING THE WRIT

POINT I

THE ELEVENTH CIRCUIT'S AFFIRMANCE OF THE
STATE COURTS FINDINGS REGARDING
PETITIONER'S PARTICIPATION IN THE
CAPITAL MURDER ARE CONSISTENT WITH THIS
COURT'S PRONOUNCEMENTS IN ENMUND v.
FLORIDA, CABANA v. BULLOCK, AND TISON v
ARIZONA.

Petitioner alleges that no state court made any factual findings regarding his mental state at the time of the murder.¹ He further argues that the Eleventh Circuit did not correct the deficiency, thereby creating an alleged conflict between the circuit court and this Court's authority regarding Enmund/Tison findings.² The Eleventh Circuit's opinion in addition to the three other courts that have ruled on this issue, the district court, the Florida Supreme Court, and the trial court, establishes that no conflict exist and review by this Court is not necessary.

The circuit court began it's analysis with recognition of the culpability requirement of Enmund v. Florida, 458 U.S.782 (1982), i.e., the capital defendant must have either killed, attempted to kill or intended to kill. Bush v. Singletary, 988 F.2d -1082, 1087 (11th Cir. 1993), citing to Enmund (citations omitted.) Such factual findings may be made at any level of the

¹ The evidence at trial established that petitioner, an active participant in the crimes committed against Julia Slater, was not the actual murderer.

² Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987).

state court proceedings, and such findings are entitled to a presumption of correctness. Cabana v. Bullock, 474 U.S. 376 (1986). Recognizing that only a small minority of jurisdictions reject a sentence of death absent an intent to kill, this Court stated that the mental culpability requirement is satisfied with a finding that the capital defendant was a major participant in the felony and his/her actions evidenced a reckless indifference to human life. Tison v. Arizona, 481 U.S. 137 (1987). Bush, 988 F.2d at 1087.

Petitioner's argument that no state court made the factual findings regarding mental culpability is belied by the trial court's sentencing order:

Of course, the only version of the actions that took place that night that we have come from your statements both out of court and in court. I guess we don't have to believe your statement, but since there is no other evidence we can't act upon anything that wasn't in evidence. So we must assume that you were an accomplice in the offense and we must assume from the evidence of Dr. Wright, the actual death occurred as a result of the bullet wound and the only evidence, direct evidence that we have is that another person imposed that. But the third part here is, and the Defendant's participation was relatively minor. The evidence that was presented in this case is that you were together with these other people during this entire evening, that it was your car, that you were doing all the driving and that it was your weapon. The evidence then shows that when you stopped down in that road you and Parker got out of the car and took the girl back and between the two of you did her in.

You took the first step by stabbing her. You said that you did not intend to kill her. Apparently the jury disbelieved that and I am privileged to disbelieve it as well. In any event, what you did, stabbing her, making her fall to the ground, facilitated and cooperated with Parker in what he did next, and therefore in my opinion there is no way to say what you did was relatively minor. emphasis added).

Bush, 988 F.2d at 1087.

The Florida Supreme Court reaffirmed the trial court's findings:

...Here we do not have a mere passive aider and abettor as in Enmund, where the only participation by Enmund was as driver of the getaway car from what he supposed was only a robbery and not a murder. The facts of this case show that Bush was a major, active participant in the convenience store robbery and his direct actions contributed to the death of the victim. The degree of Bush's participation is sufficient to support a finding that his involvement constituted the intent or contemplation required by Enmund.

Bush v. State, 461 So. 2d 936, 941 (Fla. 1984)

The district court reiterated the findings made by the state courts. (Petitioner's appendix H pgs.43-45).

After the reviewing all the above, the 11th Circuit³ determined that the trial judge's findings were constitutionally sound under Enmund. Bush, 988 F. 2d at 1088.

³ Equally without merit is petitioner's assertion that the Florida Supreme Court initially recognized Bush's statement, regarding his lack of intent to kill as the truth. The Court then decided to ignore that "finding" and uphold the sentence of death anyway. The argument is incredulous. The basis for this

The trial court's relevant findings include petitioner's actual participation in removing Ms. Slater from the car, stabbing her and then standing there while she was then executed. Other evidence to rebut his claim that he was an unwilling participant include the following; petitioner spent the entire evening with his three co-defendants agreeing to participate in the robbery. He stated that he knew what he was doing the entire evening. Bush v. Singletary, 988 F. 2d at 1092. He gave several conflicting stories regarding his involvement that evening. Bush, 461 So. 2d 937. He owned the murder weapon, which he latter disposed of, as well as the getaway car. He drove the car that entire evening. Bush, 988 F. 2d at 1092. His car was stopped by the police twice that evening shortly after the murder. Petitioner appeared very calm and collected to the police as he did not arouse suspicion. Id, at 1093. Petitioner's actions demonstrated his major participation in the felony as well as his own intention that Ms. Slater be killed. The trial court's rejection of Petitioner's self serving statement to the contrary is supported by the record.

claim is the Court's characterization of Bush's four taped statements "as the only known version of the events" that are presented in the light most favorable to him. Bush v. State, 461 So. 2d 936, 937. (Fla. 1984).

As noted by the 11th Circuit, the Court was simply recounting Bush's claim, affording him the benefit of any doubt. Bush v. Singletary, 988 F. 2d 1082, 1088. (11th Cir. 1993). In reality the Supreme Court upheld the trial court's rejection of Bush's self-serving interpretation of his actions.

Petitioner has failed to demonstrate that the state courts did not find the necessary mental culpability.⁴ The trial court's findings as well as the Florida Supreme Court's findings could not be more explicit.⁵ Petitioner has failed to demonstrate that any conflict exists to warrant review by this Court.

⁴ The district court determined that the petitioner's participation established not only reckless indifference but also the intent as described in Enmund.

⁵ In Tison v. Arizona, 481 U.S. 137 (1987) this Court noted that the two requirements of major participation in a felony and intent to kill/reckless indifference often overlap. Id., 481 U.S. at 158 n. 12.

ISSUE II

PETITIONER HAS FAILED TO DEMONSTRATE THAT THE JURY WAS IMPROPERLY INSTRUCTED OR THAT ANY PREJUDICE RESULTED FROM THE INSTRUCTIONS GIVEN

Petitioner claims that he is entitled to habeas relief based on an alleged improper jury instruction during the penalty phase. The challenged instruction pertained to the number of votes required for a jury recommendation for life as opposed to the number required for a recommendation of death. The trial court read the standard jury instruction which stated the following;

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury. The fact that the determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence and all of it, realizing the human life is at stake and bring to bear your better judgement in reaching your advisory sentence.

Now, if the majority of the jury determines that John Earl Bush should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of blank advised and recommends to the court that it impose the death penalty upon John Earl Bush. On the other hand, if by six or more votes the jury determines that John Earl Bush should not be sentenced to death, your advisory sentence will be the jury advise and recommends to the court that

it impose a sentence of life imprisonment upon John Earl Bush without the possibility of parole for twenty-five years. You will in just a moment retire to consider your recommendation. When seven or more of you are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to this court...

(R 1290-1291).

The Florida Supreme Court acknowledged that the jury instruction contained some objectionable language however any error was corrected since the court made it clear that a life recommendation only required a vote of six. Bush, 461 So.2d at 941. Since the body of the instruction was correct, there was no indication that the jury was confused and there was no objection to the instruction, the court concluded that no prejudice had been established. Id. The district court and the Eleventh Circuit court also found that the jury was never confused as to the number of votes required or that they ever were split six to six regarding their decision⁶, consequently, the petitioner did not carry his burden of showing prejudice. Bush, 988 F. 2d at 1089; (See also petitioner's appendix H pgs. 72-73).

Petitioner claims that the challenged instruction was so egregious that the Eleventh Circuit's affirmance in essence is in conflict with Mills v. Maryland, 486 U.S. 367 (1988); Caldwell v. Mississippi, 472 U.S. 320 (1985) and McKoy v. North Carolina,

⁶ The jury was instructed that their decision could be made by a single ballot. (R 1290).

494 U.S. 433 (1987). Petitioner is mistaken as all three cases are distinguishable on various grounds. In Caldwell, supra, this Court determined that the jury instructions were improper/inaccurate as they incorrectly defined the jury's role in Mississippi's sentencing scheme. The jury was explicitly told that their role was minimal. There did not exist other instructions to counter that incorrect statement. In Mills this Court determined that the entire sentencing scheme via the instructions and verdict form was unconstitutional as a jury was precluded from considering mitigating evidence. Id. Similarly in McKoy, North Carolina's sentencing scheme was found constitutionally infirm based on Mills. Conversely in the instant case, the instruction under attack is not incorrect, as a whole it correctly states what the law is regarding the required number of votes for both a life or death recommendation. Bush, 461 So. 2d at 941. Nor does the offending statement impermissibly infringe on any constitutional guarantees, i.e., preclude the jury from considering any mitigating evidence, improperly shift the burden of proof to the defendant.

The above cases can also be distinguished based on their procedural posture before this court. All three cases were before this Court on direct review. Caldwell, 472 U.S. at 323; Mills, 486 U.S. 369; McKoy, 494 U.S. at 437-438. The instant case appears before this Court on collateral review. As this Court recently stated in Brecht v. Abrahamson, 507 U.S. ___, 123 L. Ed.2d 353, 113 S. Ct. ___ (1993), the test for determining

harmless error is "whether the error had substantial and injurious effect or influence in determining the jury's verdict" Brecht, 123 L. Ed. 2d 373 citing Kotteakos v. United States, 328 U.S. 750 (1946). The burden is on the petitioner to establish actual prejudice. Brecht. Furthermore, to establish federal relief based on an improper jury instruction, the instruction must not only be undesirable, erroneous or even universally condemned, it must violate a constitutional right. Cupp v. Naughten, 414 U.S. 141 (1973). With these principles and distinguishing factors in mind, petitioner cannot establish that any conflict exists between the instant case and past precedent from this Court.

All the courts reviewing this claim determined that the trial court's instructions as a whole properly stated the law. Such an analysis is required as this Court stated, a jury instruction must be viewed in context of the overall instructions. Naughten. Given that the trial court did specifically instruct the jury that a six to six vote was sufficient for a life recommendation⁷, and there was no evidence that they were confused or deadlocked at six, petitioner cannot establish any actual prejudice. The circuit court's rejection of

⁷ The fact that instruction was not objected to nor brought forth until appellate review, demonstrates that the probability that the alleged error substantially affected the jury deliberations is remote. Henderson v. Kibbe, 431 U.S. 145, 155 (1977).

this claim is consistent with precedent from this Court. Brecht; Naughten. Review must be denied.

ISSUE III

THE ELEVENTH CIRCUIT'S DETERMINATION
THAT PETITIONER RECEIVED EFFECTIVE
ASSISTANCE OF COUNSEL IS CONSISTENT WITH
PRECEDENT FROM THIS COURT

Petitioner attempts to create conflict between the instant case and Strickland v. Washington, 466 U.S. 668 (1984) by relying on the dissenting opinion and totally ignoring the factual findings found by the district court and upheld by the circuit court. Bush v. Singletary, 988 F.2d at 1089-1090. The Eleventh Circuit's opinion details the factual findings of the district court. Id. Trial counsel did investigate petitioner's background⁸ and made a decision that evidence of poor background and family life was not beneficial enough to risk the introduction of damaging rebuttal testimony. Such a decision is constitutionally sound. Burger v. Kemp, 483 U.S. 776, 790-795. (1987).

Trial counsel also made a strategic decision not to pursue mitigating evidence based on mental deficiency, passive nature or intoxication. Such was based on the fact that there was simply no evidence to support same,⁹ consequently trial

⁸ Contrary to petitioner's distorted rendition of the facts developed at the evidentiary hearing, trial counsel testified that he discussed potential mitigating evidence with family members, and with a psychiatrist. His three discussions with the doctor included reference to the police reports, petitioner's statements and the statements from the co-defendants.

⁹ It should be noted that present counsel abandoned any claim dealing with petitioner's competency or alleged violation of Ake v. Oklahoma, 470 U.S. 68 (1985). Bush v. Singletary, 988 F. 2d 1082, 1085-1086 n.1 (11th Cir. 1993).

counsel's limitation on investigation was reasonable. Bush, 988 F. 2d 1090-1091, Burger, 483 U.S. at 795. Petitioner distorts the evidentiary hearing testimony of trial counsel.¹⁰ Bush, 988 F. 2d at 1090-1093. Furthermore, petitioner focuses strictly on what trial counsel did not pursue without consideration of what counsel did present. Such an analysis is incomplete and contrary to the dictates of Strickland. Given the lack of other mitigating evidence in conjunction with petitioner's confessions to the felonies, trial counsel decided to pursue an Enmund/Tison¹¹ defense. Given that the defense was consistent with petitioner's statement, trial counsel's actions were reasonable.

The Eleventh Circuit's determination regarding prejudice also comports with this Court's prior decisions. The circuit court found no prejudice based on the fact that most of the alleged mitigation was simply not credible, as it was rebutted by petitioner himself. Bush, F. 2d 988 at 1093. The Florida Supreme Court made a similar observation when denying this claim. Bush v. Wainwright, 505 So. 2d 409, 411 (Fla. 1987).

Furthermore, petitioner himself demonstrated at trial that he was anything but remorseful or passive. Bush v. Singletary, 988 F. 2d 1082, 1091 (11th Cir. 1993).

¹⁰ When asked specifically questions regarding whether he investigated D.O.C. records and school records, trial counsel did not have a strategic reason for not pursuing that information. (Respondent's appendix pg.319). However, trial counsel did discuss what investigation he did pursue and why certain avenues were abandoned.

¹¹ See n. 2

Given that the trial court is allowed to assign what ever weight deemed appropriate to the mitigating evidence, Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982), the district court and circuit court's analysis/ characterization of the evidence is sound. Furthermore a prejudice determination must take into account not only the outcome but whether the result of the proceeding was unfair or unreliable. Lockhart v. Fretwell, 506 U.S. ___, 122 L. Ed. 2d 180, 189, 113 S. Ct. ___ (1993). The proffered testimony¹² was either rebutted or of little value. The absence of this information at trial did not result in an unfair or unreliable sentencing hearing. The Eleventh Circuit's determination that Petitioner received effective assistance of counsel is consistent with precedent from this Court. Strickland; Burger; Fretwell. Review must be denied.

¹² The testimony consisted of general positive affirmations regarding petitioner's family relationships. A mental health expert also testified that petitioner was not psychotic but future psychosis was possible. There were differing opinions regarding petitioner's IQ. One doctor testified that petitioner had an IQ of 88-91. Petitioner has obtained his GED in prison.

There was also conflicting evidence regarding whether or not Petitioner was physically abused as a child.

CONCLUSION

WHEREFORE, based on the above articulated facts and relevant case law, respondent respectfully submits that petitioner has failed to establish that any conflict exists between the Eleventh Circuit's opinion and any pertinent case from this Honorable court. As such petitioner's request for review should be DENIED.

NO 93-6431

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

JOHN EARL BUSH,

Petitioner,

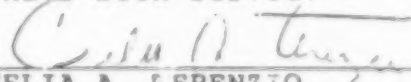
vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, Celia A. Terenzio, a member of the Bar of this Court, hereby certify that on this 18th day of November, 1993, a copy of the Petition for Writ of Certiorari in the above-entitled case was furnished by United States Mail to: BILLY H. NOLAS, ESQUIRE and JULIE D. NAYLOR, ESQUIRE, P. O. Box 4905, Ocala, Florida 34478, counsel for the petitioner herein. I further certify that all parties required to be served have been served.


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CASE NO. 93-6431

5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

JOHN EARL BUSH,

Petitioner,

vs.

HARRY K. SINGLETARY,

Respondent.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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November 18, 1993

136 14

1 dispute about that and that's about all he could add, I
2 think.

3 So I don't think we need to waste -- that would
4 delay this Court from making any decision in this case. We
5 would have to wait till the 12th. We would have to get a
6 transcript of that so I could read it. It would just delay
7 matters and I think it would be better not to, so I'm not
8 going to permit that.

9 MR. BARTMON: Just for record purposes, I just
10 want to note that I would object to Your Honor's ruling,
11 but just for the record.

12 THE COURT: Okay. Your objection is noted. And
13 I think it would just be cumulative and repetitious. Okay.

14 Now, call your next witness.

15 MR. NOLAS: Yes, we would call Mr. Muschott.

16 THE COURT: Call Mr. Muschott, please. Come
17 forward and be sworn.

18 LEE EDWARD MUSCHOTT, PETITIONER'S WITNESS, SWORN

19 THE CLERK: State your name for the record and
20 please spell your last name.

21 THE WITNESS: My name is Lee Edward Muschott.
22 Last name is M-u-s-c-h-o-t-t.

23 DIRECT EXAMINATION

24 BY MR. NOLAS:

25 Q Mr. Muschott, how are you, sir?

1 A Fine, thank you.

2 Q My name is Billy Nolas and I'm currently representing
3 Mr. Bush. Do you know Mr. Bush seated over here
4 (indicating)?

5 A Yes, I do.

6 Q Can you tell us how it is that you know him, sir?

7 A I was appointed to represent him in connection with a
8 case in Martin County.

9 Q And do you recall what the charge was in that action?

10 A He was charged with armed robbery, kidnapping, and
11 first degree murder.

12 Q At the time of Mr. Bush's trial, how long had you been
13 an attorney?

14 A That was 1982. I was admitted in May of 1974.

15 Q And had you had any experience with the Public
16 Defender's Office prior to that?

17 A As a Public Defender?

18 Q Yes.

19 A No, not as a Public Defender.

20 Q Had you had any experience as a prosecutor prior to
21 Mr. Bush's trial?

22 A No.

23 Q Have you had an opportunity recently to review any
24 records of yours or from the court files or anything along
25 those lines in Mr. Bush's case?

1 A I briefly reviewed a report by a psychologist. The
2 name escapes me. A lady.

3 Q Carbonell?

4 A Yes.

5 Q Anything else that you've had an opportunity to
6 review?

7 A I have been given some materials. I haven't had an
8 opportunity to review them in depth.

9 Q Have you had an opportunity recently to review the
10 penalty phase transcript at the Bush trial?

11 A I haven't reviewed that recently.

12 Q Do you have some recollection about that, your
13 firsthand experience?

14 A Yes, I do.

15 Q Could you -- how is it that you came about getting Dr.
16 Carbonell's report, by the way?

17 A It was given to me by Mr. Bartmon, a copy of that,
18 together with the petition and all of the attachments. It
19 included the transcript abstracts. That was included in
20 the package.

21 Q Have you had an opportunity to bring your file with
22 you?

23 A Yes, sir, I have.

24 Q What I would like to do is just ask you certain
25 questions covering certain general areas in Mr. Bush's case

1 and basically, if you recall, you can provide us with an
2 answer. If you don't, then the records to a certain extent
3 can speak for itself. I'm sure, as you remember, it's kind
4 of extensive.

5 MR. NOLAS: And, Your Honor, these documents are
6 for the most part in the record. Some of them are from Mr.
7 Muschott's file. I can represent that they are from the
8 copy that Mr. Muschott provided us. And that if Mr.
9 Bartmon would like, we could --

10 THE COURT: You say they're in the record. Are
11 they an exhibit?

12 MR. NOLAS: They're in the record on appeal as
13 Exhibit 1. Most of these documents are. And rather than
14 pulling them from the original record and all that, I'm
15 just going to use my copies and we can have them marked
16 again.

17 THE COURT: That will be fine. You don't have
18 any problem with that?

19 MR. BARTMON: No, I don't as long as I can see
20 the document before he shows it to the witness.

21 MR. NOLAS: (Tendering)

22 MR. BARTMON: Okay.

23 BY MR. NOLAS:

24 Q Mr. Muschott, let me just show you this document and
25 ask if you identify that for us, please.

1 A This appears to be the judgment and sentence that was
2 entered on Mr. Bush's prior offense which predated the
3 offenses that he was charged with that I represented him
4 on.

5 Q And did that have a cover memorandum with it?

6 A When I received it?

7 Q Yes.

8 A I frankly don't recall.

9 Q Okay. Is there a cover memorandum with it?

10 A There is here.

11 Q Can you tell us what that says, basically?

12 A From Jim Midelis to Lee E. Muschott, "Enclosed please
13 find a copy of the judgment and sentence of John Bush's
14 previous conviction. If you have any questions, please
15 call me."

16 Q And that was forwarded to you by the State Attorney's
17 Office?

18 MR. BARTMON: Objection. The witness said he
19 didn't recall.

20 THE COURT: Well, he's asking him whether it was.

21 MR. BARTMON: I think the previous question was,
22 the witness said he didn't recall whether this was on the
23 sheet he was given, so --

24 THE COURT: Well, he did, but are you referring
25 to the sheet or are you referring to the --

1 THE WITNESS: I recognize --

2 BY MR. NOLAS:

3 Q Mr. Muschott, do you recall receiving that from the
4 State Attorney's Office?

5 A I don't have a specific recollection of receiving it
6 from the State Attorney's Office. I do recognize the
7 judgment and sentence.

8 Q Okay. With regard to that judgment and sentence, did
9 you, yourself, obtain any other records about Mr. Bush's
10 1974 conviction?

11 A I didn't obtain any records. To the best of my
12 recollection, I reviewed the court file. And I think by
13 that time it was on microfilm at the St. Lucie County
14 Courthouse. And then I spoke with the Assistant Public
15 Defender who had represented him in that case which was
16 Richard Shott.

17 Q Now, with regard to that case, did you ever obtain the
18 transcript of the case itself, of the trial?

19 A No, I did not.

20 Q Did you obtain any Division of Youth Services records
21 regarding that case?

22 A I didn't obtain any records. If I had reviewed any,
23 they would have been only those records that would have
24 been part of the Circuit Court file.

25 Q Do you recall what was in the Circuit Court file?

1 A I don't have an independent recollection of all the
2 documents, but it would have consisted of the usual bilevel
3 Circuit Court file, which would have been the information
4 and probably a demand for discovery and response, and then
5 various subpoenas and, of course, the pre-sentence
6 investigation report. And the judgment and sentence would
7 have been included as well.

8 Q You indicated you did see that, the pre-sentence
9 investigation report on that case?

10 A I don't have an independent recollection of seeing the
11 report or the contents. But I do recall I reviewed the
12 file and there would have been a pre-sentence
13 investigation, certainly.

14 Q Could you relate to us what your impression was at the
15 time with regard to the pre-sentence investigation in the
16 '74 case?

17 A I frankly don't have an independent recollection of
18 this time of what my impression was.

19 Q Now, at the period of time we're talking of prior to
20 Mr. Bush's trial --

21 A Right.

22 Q -- did you obtain Mr. Bush's juvenile record and Youth
23 Division records, anything along those lines?

24 A I did not obtain any juvenile records.

25 Q During that same period of time, did you obtain any

1 Department of Corrections records regarding Mr. Bush's
2 incarceration records, those types of things?

3 A No, I didn't obtain any DOC records.

4 Q What about his school records? Did you obtain any
5 school records? Did you do that?

6 A No.

7 Q Again, during that same period of time, did you obtain
8 any records of prior psychological evaluations, prior
9 mental health evaluations, anything along those lines?

10 A No.

11 Q Did you, again during that same period of time, speak
12 to any, for example, professionals who had seen Mr. Bush in
13 the past, whether in school or in Youth Services or in the
14 Department of Corrections, the person who prepared the PSI,
15 for example, or psychologists or anybody like that that you
16 recall prior to this case?

17 A Prior to the trial of this case? The only
18 professional that I would have spoken with would have been
19 Mr. Shott who represented him in that prior --

20 THE COURT: That's the Public Defender?

21 THE WITNESS: Yes, sir, it is, Your Honor.

22 BY MR. NOLAS:

23 Q Would it be fair to say that, again before the trial
24 here in '82 or up until the verdict came in, you were
25 unaware of the contents of these records that we're talking

1 about?

2 A The DOC records?

3 Q DOC, school, juvenile, those types of things. Prior
4 psychological, that kind of stuff.

5 A Right.

6 Q Now -- and let me just ask you, if you recall in this
7 regard, let me just ask you a few fact specific questions
8 here.

9 Up until the point of Mr. Bush's trial in this case,
10 in the '62 case, do you recall -- I'm just ask you the
11 names and you can tell me if you recall speaking with these
12 individuals. Do you recall speaking with Denise Ferrell?

13 A The name rings a bell, but I don't have an independent
14 recollection of speaking with her.

15 Q How about Chester Beacham? Is that someone you spoke
16 to?

17 A No.

18 Q What about Debora Mitchell?

19 A No.

20 Q What about W. C. Bush, Jr., not the father?

21 A To the best of my recollection, that was Mr. Bush's
22 younger brother.

23 Q Right.

24 A And I did speak with him prior to the trial. He came
25 to the office a couple of times.

1 Q Do you recall what you spoke to him about?

2 A Well, we discussed John's case and the -- he, of
3 course, was concerned as a family member, his brother. And
4 I don't have an independent recollection of all of our
5 discussions, but we discussed the State's case against
6 John.

7 I briefly reviewed with him what I felt the
8 appropriate defense strategies were and trying to answer
9 any questions that he had. I spoke to him about John's
10 background and the family background in general.

11 I told him that if there were any other family members
12 that had any questions, they could feel free to contact me.
13 John was incarcerated in Martin County and, of course, no
14 bond. So family members were in Fort Pierce which is where
15 my office was located.

16 Q Surely. By the way, did you speak to Tony Knight or
17 Luigi Phillips, the co-defendants in the '74 case at any
18 point?

19 A No.

20 Q Did you speak to whoever their attorneys may have been
21 at any point?

22 A I don't recall who their attorneys were. Mr. Bush had
23 Mr. Shott and I can't recall at the time that Mr. Shott
24 represented Mr. Bush in that prior offense whether Mr.
25 Shott was still with the Public Defender's Office or

1 whether he was a Special Public Defender in that case. So
2 I don't recall who the attorneys were for the other two
3 co-defendants.

4 Q And Mr. Shott had represented Mr. Bush in that other
5 case?

6 A Right.

7 Q How about Willie Beacham? Is that someone that you
8 recall speaking to?

9 A No.

10 Q David Smith?

11 A No.

12 Q Peter Freeman?

13 A No.

14 Q Christine Avaret?

15 A No.

16 Q Joanne Hawkins?

17 A No.

18 Q Janie Nicholson?

19 A No.

20 Q Katherine Lewis?

21 A No.

22 Q Gregory Parish?

23 A No.

24 Q Moses Mitchell?

25 A No.

1 Q Wilbur Phillips?

2 A No.

3 Q James Phillips?

4 A No.

5 Q Okay. And Madeline Hinton is the person who prepared
6 the PSI that you referred to in '74. Actually she didn't
7 prepare the PSI. She was involved in that investigation.
8 You never spoke to her, did you?

9 A No.

10 Q What about Randy Cecil?

11 A No.

12 Q J. B. Collins?

13 A No.

14 Q Now, I mentioned a moment ago W. C. Bush, Sr., the
15 father. You did speak to him, I believe, prior to the
16 trial?

17 A Yes, sir, I did.

18 Q Would that be the same as with W. C., Jr., would that
19 be sort of a -- they would ask you what's going on in the
20 case, that kind of thing?

21 A Yes, sir.

22 Q Other than those two, the father and W. C., Jr., do
23 you recall speaking to any other family members of Mr.
24 Bush's?

25 A No, I don't.

Q Okay. Did these two gentleman, the two W. C.s appeared concerned about John?

A Yes, they did.

Q What was their perspective of the facts of the case? Were they surprised? Were they -- when you told them -- I assume you told them what the State was going to try to prove.

A Sure.

Q How did they react? Were they perplexed, surprised?

A They weren't surprised. I think the period for surprise if there had been any -- and I don't know what went through their minds obviously -- had passed by the time I became involved in the case because, of course, Mr. Shott had been appointed in this case as well. And then I replaced him. So, the case had been -- the arrest and the case preceded my involvement by, to the best of my recollection, a week or two. They were both very concerned. Mr. Bush, as I recall, my impression of his reaction was --

Q By Mr. Bush, you mean --

A I'm sorry, Mr. Bush, Sr.

Q W. C. Sr.?

A Yes, sir. My recollection and my impression of his reaction was that he was deeply concerned and deeply saddened. W. C., Jr., was deeply concerned and more

interested in what the facts were and what evidence the State had.

I did tell Mr. Bush, Sr., as the case developed what the facts were developing to be and what evidence the State appeared to have. And he listened to that, but he didn't ask too many questions in that regard.

Mr. Bush, Jr., was more interested and seemed to be more interested in finding out details in that regard, in that aspect of the case.

Q By the way, did you ever obtain Mr. Bush's jail records in this case?

A I don't think I did, no.

Q What about jail records as opposed to prison records from any prior case, say, from the '74 case?

A No.

Q Were you aware -- withdraw that, Your Honor.

Did you ever speak to a gentleman by the name of Bill Ross who was a cellmate of Mr. Bush's?

A Bill Ross?

Q Yeah. Does that name ring any bells?

A No, it doesn't.

Q Let me ask you just a couple of other folks. Brenda Carter? Is that anyone?

A No.

Q You didn't speak to Brenda Carter. Let me rephrase

1 that question.

2 A That's correct. I did not speak to her. I don't have
3 a recollection of speaking to her.

4 Q Now, did Mr. Bush, Sr., and his son, W. C., Jr., did
5 they come to your office of their own accord?

6 A Yes.

7 Q You didn't have to go out and sort of drag them in or
8 anything, did you?

9 A No.

10 Q Did you ever, yourself, go to their area of residence,
11 to where the Bush family lived?

12 A I don't believe I did. I'm familiar with the area,
13 but I don't think I ever went to their home.

14 Q Did you go to the home of any family members as far as
15 you recall of Mr. Bush's or a friend or a neighbor or
16 somebody that he knew from the community?

17 A No.

18 Q Do you recall calling or telephoning any family member
19 or friend, people in the community who knew Mr. Bush prior
20 to the trial?

21 A I'm sure that I did speak with Mr. Bush, Sr., on the
22 phone. And I think probably I spoke with Mr. Bush, Jr.

23 Q And do you recall whether you called them or they
24 called you about information or how that came about?

25 A I think it was probably was they called me or I

1 returned their call. I did speak to them. I did initiate
2 telephone calls to them on a couple of occasions. If I was
3 working on the file and I felt I needed some specific
4 information, you know, I had a number that I could call and
5 I would call and leave word or speak with them if they were
6 there.

7 Q They were concerned; isn't that --

8 MR. BARTMON: Objection. Judge, I've tried -- I
9 think the questions are more and more leading.

10 THE COURT: Well, I think he's going to have to
11 lead this witness to some degree. And if you want me to
12 decide, I'll decide. And I think he is sufficiently
13 identified with the other side that you may ask leading
14 questions. I don't want you to get into --

15 MR. NOLAS: I don't think either Mr. Muschott or
16 Your Honor -- this has not been cross-examination by any
17 stretch.

18 THE COURT: At least to develop the testimony, I
19 will permit that. Go ahead.

20 MR. NOLAS: Thank you, Your Honor.

21 BY MR. NOLAS:

22 Q Mr. Muschott, they were concerned, the two family
23 members that you did speak to, they were concerned about
24 John, were they not?

25 A Yes.

1 Q Let me show you a document from your file, Mr.
2 Muschott, and you can just double-check on me to make sure
3 I have the right document. And let me just ask you a
4 couple of questions about it.

5 Can you just identify this for us, please?

6 A This is a memo to file dated 5-28-82 --

7 THE COURT: It probably would be helpful for
8 record purposes if you tell us at least from which exhibit
9 this comes. Is this again from Exhibit 1?

10 MR. NOLAS: No, this is one of those documents
11 that I referred to in the beginning that when I said, Your
12 Honor, they may be a couple of things we left out of the
13 exhibit list. This from Mr. Muschott's file. We haven't
14 formally --

15 THE COURT: So you're going to -- this is one
16 that you're going to offer as an exhibit?

17 MR. NOLAS: What I propose to do is when we --
18 I'm leaving -- the documents I'm giving Mr. Muschott, I'm
19 leaving up there with him. And when we complete, my
20 proposal is to just take the whole bunch and mark it as
21 Exhibit -- I think we're up to 14 -- if that's okay with
22 the Court.

23 THE COURT: Is that all right with you, Mr.
24 Bartmon?

25 MR. BARTMON: I'd rather for admissibility

1 purposes take them one at a time, but I don't have any
2 objection to doing that at the conclusion of the testimony.

3 MR. NOLAS: All of them, Judge, are documents
4 from the record on appeal or from Mr. Muschott's file. I
5 mean, there's no --

6 THE COURT: Well, those are from the record on
7 appeal, I think, are already in evidence, are they not, as
8 Exhibit No. 1?

9 MR. NOLAS: Yes, but again I'd like to show them
10 to Mr. Muschott.

11 THE COURT: Well, sure, you can do that so that
12 he can explain it. But those that are not in evidence such
13 as this, if you're going to ask him to publish it or read
14 from it or do anything like that, it needs to be in
15 evidence first.

16 MR. NOLAS: Well, why don't we, subject to
17 admissibility, have these identified as I think it's
18 Exhibit 14 that we're up to?

19 THE COURT: Are you going to have any objection
20 to any of these documents?

21 MR. BARTMON: See, I don't believe I will, but I
22 wouldn't know that for certain until I actually review each
23 and every one. I can't assume I'm not going to have any
24 objections.

25 THE COURT: All right. They can be a part of 14,

1 but I think we should make them A, B, C, or what have you,
2 so if we ever need to refer to them again, we'll know which
3 document we're talking about.

4 BY MR. NOLAS:

5 Q Okay, then. Mr. Muschott, let's call the first one
6 14A. That was the memorandum from the State Attorney's
7 Office with the 1974 records.

8 A Okay.

9 Q And we can call this one 14B.

10 A Okay. Incidentally, I'm just now glancing again at
11 this memorandum. It has a date stamp on here which appears
12 to have been the date stamp that was put on here by my
13 office.

14 Q Okay. Could you tell us the date on there?

15 A September the 15th, 1982.

16 Q Do you recall when the trial was?

17 A October or November, 1982.

18 Q Okay.

19 A I think it was November.

20 Q Anyway, with 14B, let's turn to 14B, can you identify
21 that for us?

22 A Okay.

23 THE COURT: Maybe Mr. McClain can help you. Have
24 you got some of these little exhibit tags?

25 MR. McClain: No, I don't have any, but if you

1 would like --

2 THE COURT: We'll give you some. Start -- get a
3 stapler and start marking those so they're premarked as our
4 local rules require.

5 MR. NOLAS: I'm sorry, Your Honor.

6 THE COURT: Because, otherwise, we're going to
7 lose track of this.

8 Let's talk about 14B now. We're going to go
9 ahead and let him talk about these documents as if they are
10 in evidence, unless you have some objection to that, Mr.
11 Bartmon.

12 MR. BARTMON: I don't have any objection to that
13 procedure, no, Your Honor.

14 THE COURT: Okay.

15 BY MR. NOLAS:

16 Q Mr. Muschott, I'm sorry. Could you identify for us
17 what 14B is and just tell us what it is?

18 A It's a copy of a memo from my file.

19 Q And can you tell us what that memo is about?

20 A Yes, it says that John Earl Bush's brother-in-law,
21 Moses Mitchell, called and left his home number in Fort
22 Lauderdale and his work number in West Palm Beach.

23 Q Are the numbers listed in that memorandum?

24 A Yes, they are.

25 Q By the way, did you prepare that memorandum or did a

1 secretary prepare it for you or do you recall?

2 A I dictated this because my secretary has typed my
3 initials on here. So that means that I dictated that memo.

4 Q And you indicated you didn't speak to Mr. Moses
5 Mitchell before these proceedings; you indicated that
6 earlier?

7 A That was my recollection at that time. This refreshes
8 my recollection.

9 Q Do you recall following up on that telephone call?

10 A I'm sure I did. I don't have an independent
11 recollection of what, you know, the conversation consisted
12 of. But I certainly spoke with him on the phone and
13 dictated this memo pursuant to that telephone conversation
14 and obtained, you know, numbers where he could be reached.

15 Q Do you recall what that conversation was about?

16 A No, I don't.

17 Q Let me show you again another document from the file.

18 MR. NOLAS: We'll call it 14C, Your Honor.

19 THE COURT: Retrieve 14B and let Mr. McClain mark
20 that one before we lose it.

21 MR. NOLAS: Sure.

22 BY MR. NOLAS:

23 Q Let me just show you 14C, Mr. Muschott, and let me ask
24 you if you can identify that for us?

25 A Yes. This is a copy of a handwritten memo from my

1 file in my handwriting.

2 Q And could you relate to us -- does that document make
3 reference to Georganne Williams?

4 A Yes, it does.

5 Q Do you recall who Georganna Williams was?

6 A She was John Bush's girlfriend.

7 Q Did you talk to her before Mr. Bush's trial?

8 A Oh, yes.

9 Q Do you recall what you may have spoken to her about?

10 A Well, I spoke to Georganna several times and then she
11 was subsequently deposed, not by me.

12 Q You didn't attend her --

13 A Oh, I attended.

14 Q You did attend her deposition?

15 A Right.

16 Q Do you recall what she said at the deposition?

17 A I don't have independent recollection. She had gone
18 to the Martin County Jail and had spoken -- of course, she
19 had spoken to Mr. Bush, John Bush, but she also talked to
20 the other co-defendants.

21 And there were apparently some statements made to her
22 and there was concern among the defense attorneys that she
23 may become a person that the State Attorney would subpoena
24 for testimony about the statements that Mr. Bush and the
25 other defendants had made to her.

Q Did Mr. Parker, one of the co-defendants, make any statements to her as far as you recall?

A I think that he did make statements to her. I think that she did talk to Mr. Parker.

Q Do you remember -- and, again, this is -- see if you can place yourself back to the point in time prior to the trial. Do you remember finding out at that time that Mr. Parker told Miss Williams that he, in fact, was the person that fired the gun? That he made that admission to her in jail?

A I think he did.

Q Do you recall whether Miss Williams testified at Mr. Bush's trial?

A I frankly don't have an independent recollection of whether she did or not.

MR. NOLAS: Your Honor, could we stipulate that she, in fact, did? The record on appeal reflects that. If we can use that to refresh Mr. Muschott's recollection?

MR. BARTMON: Your Honor, if he wants to ask questions that the witness has said he doesn't independently recall, I don't know where we're going with that statement. The record will speak for itself on that subject.

THE COURT: Well, unless you need to establish that for a predicate for another question, that's something

you can --

MR. NOLAS: Yes, I do, Your Honor.

THE COURT: -- argue later. Is there any dispute about that, that she testified?

MR. BARTMON: I'm not disputing it, Judge, I just wondered where he was going --

THE COURT: Mr. Nolas says he needs to establish that as predicate for a question he's getting ready to ask. Go ahead and ask your question.

THE WITNESS: Does that refresh my memory?

MR. NOLAS: Yeah.

THE WITNESS: It does.

BY MR. NOLAS:

Q Now, at Mr. Bush's trial, you did not elicit from her that statement by Mr. Parker. Could you tell us why, if there is a reason, if you recall the reason?

A I don't have an independent recollection of the reason. I know that in handling the witnesses at the trial that there was concern about opening certain doors with respect to cross-examination. And I'm sure that if I didn't ask her that specific question, it was because I was concerned that it would have opened the door for redirect examination by the State that would have been detrimental to my client.

Q Now, do you recall specifically back then what the

1 reason may have been or are you just surmising this now by
2 looking at it back in time?

3 MR. BARTMON: Objection, Judge. I think he just
4 answered that question as to what his recollection was.

5 THE COURT: Overruled.

6 THE WITNESS: That is my best recollection. As I
7 recall now, of course, the State was not in a position to
8 prove that Mr. Bush had shot the victim because that was
9 not the evidence. And --

10 THE COURT: Did the State ever take the position,
11 either by argument or the presentation of evidence, that
12 Mr. Bush fired the gun?

13 THE WITNESS: No, Your Honor, they did not.

14 BY MR. NOLAS:

15 Q Mr. Muschott, don't you recall Mr. Stone arguing to
16 the jury, holding up a photograph of the victim, and
17 saying, "This is what happens when John Bush fires a .38
18 caliber bullet into ner head"?

19 MR. BARTMON: Objection, relevancy and it's
20 beyond the scope of this hearing.

21 THE COURT: Well, it is, and also that was done
22 prior to the cross-examination of this witness that you're
23 talking about, Georganna -- or was done after the
24 cross-examination of this witness. So I don't think it
25 would be relevant. Objection is sustained.

1 MR. NOLAS: It was going to my next series of
2 questions, Your Honor.

3 THE COURT: I sustained the objection.

4 MR. NOLAS: Yes, Your Honor.

5 BY MR. NOLAS:

6 Q Did you call Miss Williams at the penalty phase?

7 A No, I did not.

8 Q Did you present at the penalty phase any evidence from
9 the co-defendants that Mr. Bush, in fact, was not the
10 trigger man?

11 A No, I did not.

12 Q Were you aware of what the co-defendants said about
13 this incident prior to the trial?

14 A Yes.

15 Q Would it be fair to say that, with the exception of
16 Mr. Parker's statements to the police, all of the other
17 co-defendants said that Mr. Parker was the shooter?

18 A Right.

19 Q And Mr. Parker, you already indicated, told Miss
20 Williams that he was the shooter?

21 A To the best of my recollection, he did. I think I
22 recall some real concern on the part of Mr. Parker's lawyer
23 when that occurred or shortly after that occurred.

24 Q I don't know if you remember that, in fact, was used
25 at Mr. Parker's trial, that account was used?

MR. BARTMON: Objection to relevancy.

THE WITNESS: I don't know what --

THE COURT: We don't need to --

MR. NOLAS: Withdraw, Your Honor.

BY MR. NOLAS:

Q Did you develop any evidence from the co-defendants' accounts to present at the penalty phase regarding the fact that Mr. Bush was not the shooter?

A Not the co-defendants' accounts, no.

Q Mr. Bush himself also said that he was not the shooter?

A Right.

THE COURT: Did he testify to that at the penalty phase?

THE WITNESS: I believe he did, yes, sir.

THE COURT: At the penalty phase, did the State ever take the position or argue that Mr. Bush fired the gun?

THE WITNESS: Not to the best of my recollection. Their position all along was that Mr. Bush's involvement was as a principal, but not the trigger man.

BY MR. NOLAS:

Q Now, Mr. Muschott, prior to the penalty phase, in the guilt/innocence closing argument, Mr. Stone had already argued that Mr. Bush was the shooter; do you recall that?

MR. BARTMON: Objection, relevancy. It's beyond the scope.

THE COURT: Well, it may be relevant as a carry-over because it was the same jury that heard the evidence in the guilt phase that heard it on the penalty phase. Go ahead.

MR. NOLAS: Yes, Your Honor.

THE WITNESS: That -- I think I recall that Mr. Stone may have said that in closing argument and I can't recall whether I elected to object to it at that time or whether I elected to respond to it in my portion of the closing by saying that that's contrary to what they have proved.

In other words, attacking the State's credibility with their own closing argument. I can't recall which strategy I used in response to that.

BY MR. NOLAS:

Q You used the word strategy. Do you recall specifically what you did with regard to that argument?

A Oh, you mean, holding up the photograph?

Q Yeah.

A No, I don't recall whether I objected or whether I used it against him.

Q At the time of Mr. Bush's trial, were you aware of any legal theory that you could have used to introduce the

1 account of the co-defendants, namely that Mr. Parker was
2 the shooter and not Mr. Bush?

3 THE COURT: Are you confining this to the
4 sentencing phase?

5 MR. NOLAS: Sentencing phase, Your Honor, yes.

6 THE WITNESS: Yes. I felt like I could have used
7 the accounts of the co-defendants in the sentencing phase.

8 BY MR. NOLAS:

9 Q By the way, let's go back to the records for a minute.

10 All the records that we've discussed, the jail records and
11 so on and so forth, was there a tactical or a strategic
12 reason for not obtaining those records?

13 A You're talking about the jail records and the DOC
14 records?

15 Q Jail records, school records, yeah. All that kind of
16 stuff we were talking about.

17 A No, there wasn't any strategic reason for not
18 obtaining those.

19 Q And the folks that we went through that you indicated
20 you didn't talk to prior to the trial, is there a tactical
21 or strategic reason that you recall for not talking to
22 those folks?

23 A No, not that I -- I didn't have any strategic reason
24 for not talking to them. Again, I have no independent
25 recollection of talking to the ones you mentioned to me.

1 But, you know, to the extent that my memory would be
2 refreshed, I may have spoken to some of them.

3 Q Okay. But, as we discussed when we went through the
4 list, there's no tactic you can say to the judge, "I chose
5 not to talk to them for this reason"?

6 A Right.

7 Q At the time of Mr. Bush's trial, did you investigate
8 and develop any evidence regarding his background in terms
9 of poverty, in terms of being a migrant worker, that kind
10 of stuff?

11 A Well, I familiarized myself with Mr. Bush's background
12 by talking to his father and his brother. And I -- there
13 was background information probably in the PSI. I don't
14 have any independent recollection of it.

15 Q And which PSI is this? I'm sorry.

16 A That would be the one on the prior incident. I didn't
17 -- when you say migrant family, the Bush family was a low
18 income family residing in Fort Pierce. The general local
19 definition of migrant families in that area are families
20 who are purely transitory. The Busnes had lived in that
21 area for years. They were harvesters. They worked in the
22 fields.

23 Q But they were farm workers and they moved around
24 picking various farm products?

25 A Well, they moved around from grove to grove, but they

1 didn't -- they weren't transients living a gypsy existence
 2 like what we tend to think of over there as purely migrant
 3 workers. They have no local residency whatsoever. The
 4 Bushes had a home. The father and then the mother had
 5 raised the family there. They had gone to school there.

6 Q Did you develop any evidence along those lines for
 7 presentation to the jury at the penalty phase?

8 A In terms of the background?

9 Q Yeah.

10 A No.

11 Q Let me show you another portion of the record.

12 MR. NOLAS: This is from the record on appeal,
 13 Your Honor, Exhibit 1.

14 BY MR. NOLAS:

15 Q And, Mr. Muschott, I have a copy for you. Mr.
 16 Muschott, this is a pretrial status conference conducted on
 17 Wednesday, June 9th, and then there is another part
 18 relating to Wednesday, June 30th, 1982.

19 And let me first just ask you to read the cover page
 20 and just tell us if that's accurate with regard to who the
 21 judge was and your presence and the presence of the
 22 co-defendants' attorneys.

23 A It's -- oh, okay. It is accurate.

24 Q Now, if you can, do you recall that status conference
 25 at all?

1 A I don't have an independent recollection of it other
 2 than it was before Judge Trowbridge and it was in Martin
 3 County.

4 THE COURT: Which one are you referring to? You
 5 mentioned the two dates, June 3rd and June 30th, I think.

6 MR. NOLAS: Well, I was going to turn to the June
 7 30th proceedings, Your Honor. They're combined in one
 8 portion, in one transcript.

9 BY MR. NOLAS:

10 Q Mr. Muschott, let me ask you to turn to Page 81.
 11 That's June 30th.

12 A My page numbers are chopped off here. Is that 1115 on
 13 the record?

14 Q Yes. And let me ask you to just turn to Line 18 of
 15 that and look that over to yourself. And then I'm just
 16 going to ask you a couple of questions about it.

17 A (Witness complies) Okay.

18 Q In that status conference, you requested that the
 19 Court appoint Dr. Tingle to examine Mr. Bush; fair?

20 A Yes.

21 Q And you indicated that you believed he had a
 22 psychiatrist working with him. I think you meant a
 23 psychologist.

24 A I did.

25 Q Do you recall the name of that psychologist?

1 A No, I don't, no.

2 Q Dr. Sobel? Does that refresh your recollection?

3 A Right.

4 Q Later on, in fact, Dr. Tingle and Dr. Sobel were
5 appointed in this case?

6 A That's correct.

7 MR. NOLAS: Excuse me, Your Honor.

8 BY MR. NOLAS:

9 Q And out of those two doctors, one is a psychiatrist,
10 namely Dr. Tingle, and Dr. Sobel is a psychologist?

11 A That is correct.

12 Q Did you have an opportunity to meet with Dr. Tingle
13 prior to Mr. Bush's trial?

14 A Yes, I did.

15 Q Do you recall what the date of that meeting was?

16 A I do not.

17 Q Let me show you, if I may -- I will withdraw that,
18 Your Honor. I will get to that in a moment.

19 Do you recall how long you spent with Dr. Tingle at
20 that meeting?

21 A Best of my recollection, half an hour to an hour.

22 Q If the voucher you submitted for cost reflects a half
23 an hour, any reason to dispute the accuracy of that?

24 A No.

25 Q Did you meet with Dr. Sobel at any point?

1 A I don't believe I did.

2 Q Do you remember specifically what you discussed with
3 Dr. Tingle at that meeting?

4 A I went over all the facts of the case and John's
5 background, everything that I had learned to date. I
6 reviewed with him the matters that I felt would be relevant
7 for his consideration and discussed with him whether there
8 would be any benefit in having him evaluate Mr. Bush and
9 having his associate, Dr. Sobel, do any evaluations.

10 Q Did you give Dr. Tingle any records regarding Mr.
11 Bush?

12 A I don't believe that I did.

13 Q Did you -- obviously, you wouldn't have given him the
14 background records which we discussed that you didn't have?

15 A Right.

16 Q Did you give him any police reports in this case
17 regarding what happened, what the co-defendants said, what
18 Mr. Bush said, any police reports?

19 A I don't recall giving him any police reports. I
20 discussed with him what all of the records contained and
21 that would have included the police reports and, of course,
22 the statements by the co-defendants as well as, you know,
23 statements by Mr. Bush.

24 Q Right. But other than your discussion with him, did
25 you give him any papers, anything written down?

1 A I don't recall giving him anything in writing.

2 Q Do you recall giving Dr. Sobel anything in writing?

3 A I didn't give him anything in writing.

4 Q Did you ask Dr. Tingle to have Dr. Sobel test Mr.
5 Bush?

6 A No, I didn't.

7 Q Did you ever have Mr. Bush psychologically tested,
8 given any psychological tests?

9 A No.

10 Q And other than Dr. Tingle and Dr. Sobel, would it be
11 fair for me to assume there were no other mental health
12 people involved in this case?

13 A That's true.

14 Q Did you ask Dr. Tingle to physically examine Mr. Bush,
15 to see him face to face?

16 A Physically examine? No, I didn't.

17 Q Did you ask that Dr. Sobel do that?

18 A No, I did not.

19 Q Did you specifically discuss with Dr. Sobel -- can you
20 relate to us what you specifically discussed with Dr.
21 Tingle in terms of -- I think you wrote a letter to him
22 reflecting competency, sanity, something along those lines.
23 Do you recall what the discussion was about?

24 A well, we discussed the -- what would have been
25 relevant to his consideration as a consulting psychiatrist.

1 In other words, whether, based on all the information that
2 had been developed in the case given to him through me,
3 there was anything that he could have done that would have
4 been of any benefit to Mr. Bush in defense of his case,
5 either in the guilt phase or in the sentencing phase and,
6 of course, the competency issue as well to stand trial in
7 the first place.

8 Q Now, if I were to tell you that that discussion with
9 Dr. Tingle took place in late August of 1982, could that
10 refresh that recollection? Is that relatively accurate as
11 far as you recall?

12 A That sounds about right.

13 Q I'm going to show you, Mr. Muschott, another document.
14 I believe this is -- these documents that I have been
15 showing you from the file, those are your handwriting; is
16 that --

17 A This is my handwriting, 14E.

18 Q Up on the upper right-hand corner, is that an
19 appointment card from Dr. Tingle?

20 A Uh-huh. Yes, it is.

21 Q And does that provide the specific day when you spoke
22 to him?

23 A It does appear to have that, August 27th.

24 Q And can you read to us what the rest of that note
25 says?

1 A "Susanne Sobel. Have Trowbridge order him up to Vero
2 for testing."

3 Q Was that -- what is that? What did you mean by that
4 note?

5 A To the best of my recollection, Dr. Tingle I think
6 indicated to me that if I wanted to him him just tested
7 strictly from an intellectual standpoint, that Miss Sobel
8 would be the one to do that and not he. That that was her
9 function within the group.

10 Q You say intellectual. Do you mean psychological
11 testing?

12 A I think intelligence testing.

13 Q Oh, intelligence testing. Okay. Did you ever discuss
14 brain damage testing with either Dr. Tingle or Dr. Sobel?

15 A No.

16 Q Did you ever discuss personality testing with them,
17 ask them about that?

18 A I'm sure I discussed that with Dr. Tingle. I don't
19 have an independent recollection of it.

20 Q Do you recall ever asking them what the significance
21 would be of different types of testing that can be given,
22 brain damage testing as opposed to personality testing as
23 opposed to intelligence testing?

24 A Dr. Tingle and I discussed intelligence testing and
25 personality testing. I don't think we discussed brain

1 damage testing.

2 Q And that note indicated that if you would like to have
3 testing done on Mr. Bush, you should request it. I think
4 it's Judge Trowbridge, have him produced?

5 A Right.

6 Q Could you read us what the other line says?

7 A The other line is, "Bush's past history of psychiatric
8 disorder."

9 Q Was that -- the way I read that is that's something
10 that you were going to get or --

11 A To determine if there was any.

12 Q Could you tell us the date on that note?

13 A It's not dated.

14 Q There is no date on it at all?

15 A There is a notation at the top, "Call second week in
16 September," but the memo itself does not have a date.

17 Q And so it was the second week in September that the
18 call would go through about having him tested and about
19 obtaining the prior records and that kind of stuff, prior
20 psychological records, whatever the note says?

21 MR. BARTMON: Objection. I think Mr. Nolas is
22 speculating about what that might mean. Why doesn't he
23 just ask the witness?

24 THE WITNESS: I don't think that's what --

25 THE COURT: He can answer.

1 THE WITNESS: No. If I recall correctly, 'cause
2 I had stapled Dr. Tingle's card on here --

3 MR. NOLAS: Right.

4 THE WITNESS: And the -- it may have been that
5 that appointment which obviously was given to me ahead of
6 time had to be rescheduled for one reason or another and
7 that call may have been to reschedule the appointment. I'm
8 just not sure about that. I don't think that note about
9 the second week in September pertains to having the testing
10 scheduled.

11 BY MR. NOLAS:

12 Q Okay. That was just a timing thing.

13 A Right. I think that's a scheduling note there to my
14 schedule.

15 Q And we already indicated that no testing was done and
16 you didn't get any papers to Dr. Tingle or Dr. Sobel?

17 A Right.

18 Q Dr. Tingle and Dr. Sobel were appointed as
19 confidential experts; is that correct?

20 A Yes. Uh-huh.

21 Q In other words, the State would have had no access to
22 anything they may have told you?

23 A Well, not unless we decided to use them.

24 Q Right. But other than that, the State would have had
25 no access to anything?

1 A Right.

2 MR. NOLAS: This is from the record on appeal,
3 Your Honor, so I won't mark it.

4 BY MR. NOLAS:

5 Q Mr. Muschott, let me show you this, a motion that was
6 filed by yourself on behalf of Mr. Bush. And let me ask if
7 you can identify that for us, please.

8 A This is a copy of a motion I filed for funds for
9 rehabilitation and criminology experts.

10 Q Can you relate to us what that was all about, what you
11 were interested in with regard to that motion?

12 A If I remember correctly, we all filed identical
13 motions. And --

14 Q By we all, you mean the four defense attorneys on
15 behalf of the four co-defendants?

16 A Right. And there was talk of trying to obtain an
17 expert that would have testified about rehabilitation.
18 This was specifically directed, you know, at the sentencing
19 phase.

20 Q Right. And when you filed that motion, were you
21 thinking in terms also of Mr. Bush's prior record, somebody
22 to explain that or anything like that?

23 A No. My recollection of this motion and what
24 discussion with other counsel at that time was that this
25 was something that was directed to the case as a death

1 penalty case per se and not so much Mr. Bush's prior
 2 record. And the thought at that time was that this expert
 3 -- the type of expert that was contemplated by this motion
 4 would be prepared to say that the death penalty was
 5 inappropriate because a person convicted regardless of the
 6 circumstances is capable of rehabilitation, that type of
 7 thing.

8 Q Now, if you can go back to that status transcript with
 9 me, I'll just ask you a couple of questions about where
 10 this motion was discussed.

11 A Okay.

12 Q And if you could please turn to Page 51, it's 1085,
 13 and turn to Line 19 of that, please.

14 A Okay.

15 Q Okay. And Mr. Fireson there is the attorney for one
 16 of the co-defendants; correct?

17 A Correct.

18 Q He withdraws a similar motion that he filed because
 19 his psychological expert, Dr. Vaughn, was also a
 20 criminologist. Is that a fair reading of that?

21 MR. BARTMON: Objection. I don't see what the
 22 relevancy of that is.

23 MR. NOLAS: Your Honor, let me have three
 24 questions and I'll tie it together.

25 THE COURT: Okay.

1 THE WITNESS: Yes.

2 BY MR. NOLAS:

3 Q And if you could please now turn to Page 79, it's also
 4 1113 through to the top of 1114, and just please read what
 5 you, yourself, speak at Line 22 through 3 of the next page.

6 A (Witness complies) Okay.

7 Q And at that point, you withdraw the motion that you
 8 filed for a criminologist?

9 A Right.

10 Q Dr. Tingle was not a criminologist; correct?

11 A No, he was not.

12 Q Do you recall why you withdrew that motion at that
 13 point?

14 A I don't have an independent recollection at this time.

15 Q Okay. In terms of Dr. Tingle and Dr. Sobel, was there
 16 a tactical or strategic reason for not giving them records?

17 A For not giving them records?

18 Q Yes.

19 A No.

20 Q Was there a tactical or strategic reason for not
 21 having Mr. Bush tested, psychologically tested?

22 A There was no strategic reason, no.

23 Q Was there a tactical or strategic reason if you recall
 24 for not having them see Mr. Bush?

25 A There was no strategic reason.

1 Q Either of the two doctors?

2 A Right.

3 THE COURT: Let's take a 10-minute break here.

4 (Recess at 11:00 a.m.; reconvened at 11:20 a.m.)

5 (Call to order of the Court)

6 THE COURT: You may continue, Mr. Nolas.

7 BY MR. NOLAS:

8 Q Mr. Muschott, did you discuss with Dr. Tingle the
9 statutory mitigating circumstance of an extreme emotional
10 disturbance at the time of the offense?

11 A I'm sure I did. I don't have an independent
12 recollection of it, but we went over all aspects which
13 would have included the statutory mitigating circumstances.

14 Q Okay. But do you recall specifically discussing with
15 him that statutory mitigating circumstance?

16 A I don't have an independent recollection of any
17 specific circumstance.

18 Q Do you have an independent recollection of discussing
19 with Dr. Tingle the statutory mitigating circumstance of
20 whether Mr. Bush's capacity at the time of the offense to
21 conform his conduct to the requirements of the law as
22 substantially impaired?

23 A I believe I recall the discussion of diminished
24 capacity.

25 Q Diminished capacity as a guilt/innocence defense or --

1 A As a mitigating circumstance.

2 Q Now, Dr. Tingle in an affidavit indicates that there
3 was some reference to a discussion of mental status at the
4 time of the offense, but that mitigating circumstances were
5 not specifically discussed. Is that --

6 MR. BARTMON: I would object to that as leading.

7 MR. NOLAS: I haven't concluded my question, Your
8 Honor.

9 THE COURT: The objection is overruled. The
10 question is all right, but start again. I missed the first
11 part.

12 MR. NOLAS: Yes.

13 BY MR. NOLAS:

14 Q Dr. Tingle in an affidavit indicates that there was a
15 discussion about mental status at the time of the offense,
16 but that mitigating factors were not specifically
17 discussed. Is there any explanation or --

18 A Well, I -- I'm sorry.

19 Q -- can you tell us about that?

20 A I'm sorry.

21 Q Go ahead.

22 A I'm not sure Dr. Tingle maybe fully understands or
23 fully understood the difference between the mitigating
24 circumstances and the circumstances that would go to the
25 guilt/innocence phase. We did talk about all three which

1 was competence, circumstances relating to guilt/innocence,
2 and mitigating circumstances.

3 Q Did you explain to him what the mitigating
4 circumstances are, lay it out for him, give him copies of
5 cases, things along those lines?

6 A I didn't give him copies of cases. I just, you know,
7 went over with him what the statutory mitigating
8 circumstances were, and then, you know, reviewed what
9 background information I had about John, even beyond the
10 statutory circumstances.

11 Q Did you ever do any of that with Dr. Sobel?

12 A No.

13 Q You indicated he may not have understood what the
14 mitigating circumstances were?

15 A Well, I think he understood the mitigating
16 circumstances. I'm not sure that he makes the distinction
17 that it's two separate phases of the same case. He may
18 consider it all lumped together.

19 Q Did you get him to understand that or try to get him
20 to understand that?

21 A Well, he understood it, I think, for the purpose of
22 our communication, you know, that it related to two
23 different aspects of the same case.

24 Q Other than that half hour discussion, did you talk to
25 him at any other point?

1 A I don't have any independent recollection of having
2 any other conferences with him. I may have spoken to him
3 on the phone on one or two occasions.

4 Q But other than that half hour discussion, you don't
5 recall anything now?

6 A No, I don't. I don't have an independent
7 recollection, no.

8 Q At the penalty phase of Mr. Bush's trial, I believe
9 you argued certain mitigating circumstances. Age, for
10 example. Do you remember how many statutory mitigating
11 circumstances you asked for instructions on or tried to
12 present?

13 A I think I asked for instructions on four or five.

14 Q Do you recall what those were?

15 A I don't today, no. Age was one of them, I know. I
16 don't recall what the other ones were.

17 Q Would it be fair to say that at the penalty phase of
18 Mr. Bush's trial, you were trying to do the best you could
19 with what you had?

20 A That's fair.

21 Q If you had mitigating evidence beyond what you had at
22 the time, would it be fair to say that you would have
23 presented that to Mr. Bush's jury?

24 MR. BARTMON: Objection. That's kind of general
25 conclusory. It calls for speculation.

THE COURT: The objection is overruled.

THE WITNESS: I would have used it if I had thought that it was -- you know, that it had more good than detriment in it.

BY MR. NOLAS:

Q If you had mitigating evidence that Mr. Bush's capacity was substantially impaired, would you have presented that type of evidence?

A If I had felt that it was sufficiently demonstrative that that outweighed what the State would have used, you know, in rebuttal, I would have used it.

Q If you had had expert testimony in that regard that would have established that circumstance, would you have used that?

A I may have used it. It would have depended on how -- to what degree I would have felt it would have impressed the jury versus the detrimental effect of what the State would have brought back in rebuttal.

Q And in terms of the capacity --

THE COURT: That's a calculation you have to make with almost any piece of evidence, isn't it?

THE WITNESS: Yes, sir. Absolutely.

BY MR. NOLAS:

Q In that regard, Mr. Muschott, with regard to that capacity and mitigating circumstance, extreme emotional

disturbance, would it be fair to say that on those two, you didn't have any evidence about that?

A That I didn't have any evidence?

Q Right. To support those two mitigating circumstances.

A Extreme emotional disturbance and diminished capacity?

Q Yes.

A That's true.

Q And so at the time back in 1982 you didn't make a decision not to present that, you just didn't have anything to present along those lines; is that fair?

A Well, you know, I had tried to determine whether there was any evidence that could be developed on those mitigating circumstances that would have, in my view, outweighed the detrimental effects of what the State would have in all likelihood presented in rebuttal to that.

So, the answer to the question, I guess, is I had not been able to develop anything on either of those two mitigating circumstances that I felt outweighed the detrimental effect of what the State would have presented in opposition.

THE COURT: What were you concerned that the State would have presented? Can you discuss that generally?

THE WITNESS: Well, I was concerned with what the State would have presented in terms of, I think, number

one, facts and circumstances surrounding the prior offense.

And possibly --

THE COURT: That's the conviction for rape and kidnapping?

THE WITNESS: Yes, sir.

THE COURT: All right. At this stage of the trial, that is the sentencing phase, how much had the jury and the Court learned about that offense? Do you remember?

THE WITNESS: Just what is reflected on Exhibit A, that he was convicted of that crime.

THE COURT: They didn't have any of the details, though?

THE WITNESS: Right. Of course, they had that in the sentencing phase, not in the guilt phase. At the close of the State's case on the sentencing phase, that's all they had.

THE COURT: Okay.

BY MR. NOLAS:

Q At the sentencing phase, they also had the closing argument, the State's closing argument?

A Right.

Q And that closing argument referred to the fact that it was a brutal rape, a brutal robbery, that Mr. Bush was sentenced to 30 years, but was nevertheless paroled, that it was a horrendous offense, that the jury should not let

it happen again, and also --

THE COURT: They had that at the --

MR. NOLAS: At the penalty phase, Your Honor.

THE COURT: I thought you just said the guilt phase. Maybe I misunderstood.

MR. NOLAS: No. If I said guilt, I meant penalty, Your Honor.

BY MR. NOLAS:

Q Do you recall that argument presented by Mr. Stone regarding that prior --

A I don't have an independent recollection, but if that's what the record reflects, you know, I don't have any reason to dispute that.

THE COURT: Well, that's because Mr. Bush testified, isn't it? He wouldn't --

THE WITNESS: Well, in part, that's true, because we had -- that's correct.

BY MR. NOLAS:

Q Mr. Muschott, they did admit the judgment of conviction and the sentencing on --

A Yes, they did.

Q And they presented the parole officer who talked about that case as well; correct?

A I believe they did present the parole officer.

Q And they presented another witness. I believe it was

1 a law enforcement officer who referred to that case.

2 A During the sentencing phase?

3 Q Yeah.

4 A That I don't specifically recall. If I hear his name,
5 it might refresh my memory.

6 Q Okay. Well, we can just let the record speak for
7 itself on that.

8 A Right.

9 Q And the State put that on before Mr. Bush testified?

10 A That's right.

11 THE COURT: Was it your position, Mr. Nolas, that
12 that evidence that you just alluded to, the bare conviction
13 or judgment of conviction and whatever other evidence that
14 they presented would have been sufficient to permit the
15 prosecutor to argue details of the rape and robbery?

16 MR. NOLAS: Yes, he did, Your Honor.

17 THE COURT: I know he did, but based on the
18 evidence that they presented or based on evidence that was
19 obtained through cross-examination of Mr. Bush?

20 MR. NOLAS: My understanding and I'm sure there
21 will be a debate on this with Mr. Bartmon, is that that was
22 based on what the State presented. They were going to do
23 that --

24 THE COURT: Well, that's something that may be
25 important, but the record, as you say, will permit me to

1 conclude what needs to be concluded in that regard. But
2 I'd like your view, Mr. Bartmon's view about that at some
3 later stage of this proceeding.

4 MR. NOLAS: Yes, Your Honor.

5 BY MR. NOLAS:

6 Q Now, at the time of Mr. Bush's sentencing in 1982, is
7 it fair to say that you had not developed at that point or
8 did not have at that point any mental health mitigating
9 evidence, any expert testimony along those lines?

10 A Had not developed anything, that's correct.

11 Q So, at the time, you didn't do a weighing process,
12 should I put this on, should I not put this on, in that
13 regard?

14 A ~~Well~~, I had done that weighing process prior to the
15 sentencing phase of the trial.

16 Q Right. But I guess my point is, you couldn't weigh
17 something you didn't have?

18 A Well, I couldn't have something I couldn't develop.
19 I just at that point had not, that I would determine, been
20 able to develop anything that I saw was going to lead to
21 outweighed what would have come in on the coattails of that
22 from the State.

23 Q But would it be also fair to say that you don't know
24 what the results of testing would have reflected back then?

25 A I don't know with certainty.

Q And the testing could very well have outweighed the detrimental effect or could not have?

MR. BARTMON: Your Honor, that's sort of speculation here.

THE COURT: Well, it's a matter of argument. That's an argumentative question.

MR. NOLAS: I'm sorry, Your Honor, I --

THE COURT: I said that's an argumentative question. You can -- he's testified about that.

BY MR. NOLAS:

Q Do you recall Mr. Bush testifying as to his remorse at the sentencing phase?

A His live testimony?

Q Yeah.

A I recall his live testimony. I don't recall any specific remarks about remorse.

Q If the record reflects that you didn't argue anything along the lines of remorse, is there any tactical decision that you recall now that you can relate to us in that regard?

MR. BARTMON: Objection. It assumes facts not in evidence.

MR. NOLAS: The record on appeal has been in evidence forever, Judge.

THE COURT: Well, if that's a fair

characterization.

MR. BARTMON: Let me rephrase it. It is not a fair characterization. It's an argumentative question from that standpoint.

THE COURT: Well, if you want to assume -- ask him to assume that he didn't argue remorse, that puts a burden on you to convince me or the trier of fact at some point that he did not --

MR. NOLAS: Sure.

THE COURT: -- for this question to have any probative value or any answer that he may give. But you may answer the question.

THE WITNESS: I don't recall not arguing remorse.

BY MR. NOLAS:

Q Did you develop any evidence to explain the prior offense in 1974 to the jury?

A No.

Q Did you develop at the time any evidence regarding what happened to Mr. Bush during his incarceration?

A For the prior offense?

Q Yeah.

A No.

Q Were you aware of what happened to Mr. Bush during that period of time?

A Only from what he told me.

1 Q Were you aware of the fact that he was molested and
2 raped on a number of occasions?

3 A He told me he had problems in prison of that type.

4 Q Were you aware of that fact that he was 15 years old
5 and he was incarcerated in an adult prison?

6 A Right.

7 Q And I think we can all agree that Mr. Bush is a small
8 person?

9 A That's correct.

10 Q Did you develop any evidence along those lines for
11 presentation at the penalty phase?

12 A No, I did not.

13 Q Do you recall what the jury vote was?

14 A Seven to five.

15 Q Prior to the trial, did you become aware of the fact
16 that the four co-defendants had indicated there was some
17 drinking that had gone on that night and some use of
18 marijuana?

19 A I remember the drinking. I don't specifically --
20 yeah. Okay, I remember the marijuana, too, right.

21 Q Did you develop any evidence along those lines for
22 presentation at the penalty phase?

23 A No.

24 Q Did the State have a strong case against Mr. Bush in
25 your opinion?

1 A Actually for the guilt/innocence phase?

2 Q On the guilt/innocence phase.

3 A Oh, yeah. Yes.

4 MR. NOLAS: If I can have just a moment, Your
5 Honor.

6 (Pause in the proceedings)

7 MR. NOLAS: If I could have the Court's
8 indulgence for one moment, Judge.

9 (Pause in the proceedings)

10 BY MR. NOLAS:

11 Q Mr. Muschott, assume you had evidence of low
12 intelligence regarding Mr. Bush, that he was a person of a
13 borderline level of intellectual functioning, how would the
14 State rebut that type of evidence for the 1974 offense? In
15 other words, putting yourself back in that point in time,
16 could the State have rebutted that by using the prior
17 offense?

18 A To the extent that they would have shown or attempted
19 to show that Mr. Bush was the leader in that situation
20 which, of course, they had attempted to show was the
21 scenario in the case that I was trying. And that certain
22 things that occurred in that case were done at his
23 suggestion or by his direction.

24 THE COURT: Now, that case, you're referring to
25 the --

1 THE WITNESS: Prior case.

2 THE COURT: -- the rape and robbery.

3 BY MR. NOLAS:

4 Q Do you recall what, if anything, in the prior case was
5 done at Mr. Bush's suggestion?

6 A There was a dispute in that case as to whose idea it
7 was to commit the offense, how the thing got started in the
8 first place. To the best of my recollection, as usually is
9 the case in a co-defendant situation, there were varying
10 accounts of who really was the initiator. And I believe
11 there was an account that put the burden on Mr. Bush.

12 Q And you got this from the file that you looked at?

13 A Well, that and also from speaking with Richard Schopp
14 who had tried the case.

15 Q But you never did review the Youth Services records
16 about that case?

17 A No. Well, no, I didn't review those other than what
18 would have been in the PSI.

19 Q What about brain damage? Did the State have any
20 mental health evidence to rebut that kind of stuff, brain
21 damage, low intelligence, anything along those lines?

22 A In the sentencing phase of my case?

23 Q Yeah.

24 A Well, yeah, they would have used some of the
25 information about actions or statements by Mr. Bush that

1 would have indicated that he was, you know, functionally
2 normal during the offense that I was trying.

3 Q In this case?

4 A Right.

5 Q But they used that anyway?

6 A Not all of it.

7 Q Could you tell us what it was that they didn't use?

8 A Well --

9 MR. BARTMON: Objection. I think the record will
10 speak for itself on that point.

11 MR. NOLAS: Well, the record won't speak as to
12 what they didn't use.

13 BY MR. NOLAS:

14 Q Can you tell us what they didn't use?

15 A Well, there were statements by the co-defendants about
16 Mr. Bush's participation that were at odds with his
17 statements. And, of course, his statements went in and
18 theirs didn't. And, again, the blame -- much of the blame
19 was placed on him by the co-defendants, although the State
20 never took the position that he pulled the trigger.

21 Q Specifically, other than Parker's statement which the
22 State tried to use anyway, can you tell us what any of the
23 other co-defendants said that made Mr. Bush the leader?

24 A I can't recall specifically, but I know there were
25 statements by Parker and at least one other co-defendant

1 that indicated that, you know, he was the leader and
2 statements about whose idea it was to kill the victim.

3 Q But do you recall specifically who said that,
4 something that we can look at?

5 A I don't have a specific recollection, no.

6 Q And the State did try to use Parker's statement?

7 A Right. Tried to use it.

8 MR. NOLAS: I have nothing further, Your Honor.

9 THE COURT: You may cross-examine, Mr. Bartmon.

10 CROSS-EXAMINATION

11 BY MR. BARTMON:

12 Q Mr. Muschott, you were court appointed in this case,
13 were you not?

14 A Yes, sir.

15 Q The case we're on this morning? Could you tell us a
16 little bit about the circumstances under which that
17 occurred?

18 A I received a telephone call from Judge Trowbridge who
19 asked me if I would be willing to be appointed to this
20 case. And he had specifically called me requesting whether
21 I would volunteer because it was a Martin County case. I
22 was on the Special Public Defender appointment list in
23 St. Lucie County, but the lists are maintained by county.
24 So, my being appointed outside my county required my
25 volunteering for the case.

1 Q Had you appeared before Judge Trowbridge before in
2 either a civil or criminal matter?

3 A Yes.

4 Q Did you have criminal trial experience prior to the
5 time you represented Mr. Bush in 1982?

6 A Yes, I did.

7 Q Would you tell us the nature of that noncapital
8 criminal experience first?

9 A Prior to 1982, I had been on the Special Public
10 Defender appointment list since about 1976 and averaged
11 about two to three criminal trials per year between '82 and
12 '86.

13 Q Had you represented defendants in capital cases prior
14 to Mr. Bush?

15 A Yes.

16 Q Do you recall the names of the defendants that you
17 represented?

18 A I represented a young man named Jeffrey Stanley. I
19 represented a man named Earl Footman. I represented a
20 woman. I can't recall her name. And I believe that those
21 were the first degree murder cases and capital cases that I
22 had been involved with prior to this case.

23 Q Were you familiar -- so, then, at the time you
24 represented Mr. Bush, you were familiar with the statute,
25 the death penalty statute, aggravating circumstances, both

1 statutory and nonstatutory mitigating circumstances?

2 A Yes.

3 Q Do you recall -- I think you had stated that Mr.
4 Schopp was initially -- was he initially appointed to
5 represent Mr. Bush?

6 A Yes, he was.

7 Q Do you recall the circumstances under which you were
8 appointed to replace him?

9 A Mr. Schopp had represented Mr. Bush in the first -- in
10 the rape case in '74. And because of the outcome of that
11 case, apparently Mr. Bush was not satisfied with Mr. Schopp
12 and asked for another lawyer. And that was when I was
13 appointed.

14 Q Okay. This was a high publicity case when it came to
15 light, wasn't it?

16 A Yes.

17 Q This was tried by the prosecutor in Martin County and
18 his chief deputy?

19 A Well, it was tried by the State Attorney for the
20 Nineteenth Judicial Circuit. At that time, it was Bob
21 Stone and he was the State Attorney for the Nineteenth
22 Circuit which is Indian River, St. Lucie, Okeechobee, and
23 Martin Counties.

24 And his chief assistant in St. Lucie County -- well,
25 he had two chief assistants, Bruce Colton and Jimmy

1 Midelis. And all three of them tried the case together.

2 Q Were you familiar with Mr. Stone and Mr. Midelis as
3 prosecutors? You would call them experienced prosecutors,
4 would you not?

5 A Yes.

6 Q Experienced in capital cases, to your knowledge?

7 A Yes.

8 Q No question you were up against heavyweight
9 competition from the standpoint of capital case experience?

10 A Absolutely.

11 Q Did you analyze this case as a death penalty case from
12 the beginning?

13 A Yes. There was no doubt in my mind.

14 Q Was that based on the facts as you understood them in
15 terms of Mr. Bush's involvement and the facts and
16 circumstances of the murder and the crimes themselves?

17 A Yes.

18 Q Did you have an investigator in this case appointed
19 for you by the Court?

20 A Yes, I did.

21 Q Do you recall who that was?

22 A Hershel Thompson.

23 Q Had you worked with Mr. Thompson before?

24 A Yes, I had.

25 Q Could you tell us anything about your knowledge of his

1 experience that led you to want him to be your
2 investigator?

3 A I had worked with Mr. Thompson since about 1976 and I
4 first came to use him because of his credentials. He was a
5 private investigator at that time, but his past experience
6 included 18 years of law enforcement with the Martin County
7 Sheriff's Department and later with the St. Lucie Sheriff's
8 Department. And he had served as a road officer and also
9 as a detective.

10 And the last several years, he had served as a
11 detective. He had worked closely with the State Attorney's
12 Office in a number of cases when he was with law
13 enforcement. And he had been in private investigation
14 field for several years and he was a licensed polygraph
15 operator. So I considered Mr. Thompson to be thoroughly
16 qualified as an investigator.

17 Q Now, you met with the defendant prior to the
18 sentencing phase?

19 A Yes.

20 Q Do you recall approximately how many times you might
21 have met with him?

22 A Prior to the sentencing phase.

23 Q Uh-huh.

24 A Well, of course, we were seeing each other on a daily
25 basis at trial.

1 Q I mean, including all of those conferences. I mean,
2 in total before the sentencing.

3 A Oh, wow. In excess of 20 times.

4 Q Did Mr. Thompson, your investigator, also meet with
5 the defendant?

6 A Yes, he did.

7 Q Did he report back to you when he met with the
8 defendant concerning whatever Mr. Bush and himself had
9 discussed?

10 A Yes, he did.

11 Q So you were aware not only from your own impressions,
12 but from your investigator's conversations with Mr. Bush,
13 there were meetings involving your investigator that you
14 were aware of as well?

15 A Yes, that's correct.

16 Q Would you say you had a good relationship with Mr.
17 Bush?

18 A I think we did, yes.

19 Q Did you ever have any trouble communicating with Mr.
20 Bush?

21 MR. NOLAS: Objection, Your Honor.

22 THE COURT: What is your objection?

23 MR. NOLAS: My objection is Your Honor has denied
24 us a hearing on the competency question and I think Mr.
25 Bartmon is --

1 THE COURT: For what?

2 MR. NOLAS: Your Honor has denied us a hearing on
3 the competency issue and I don't think it's appropriate --

4 THE COURT: I think that's going to -- that
5 question is not going to that issue. Objection is
6 overruled.

7 THE WITNESS: No, I never had a problem
8 communicating with John.

9 BY MR. BARTMON:

10 Q Did you explain the felony murder concept? Did you
11 discuss that with Mr. Bush?

12 A Oh, yes, from the beginning.

13 Q So you explained to him that whether or not he pulled
14 the trigger, he could still be found guilty and sentenced
15 to death for this crime?

16 A Yes.

17 Q In your mind, did he understand that?

18 A Yes.

19 Q Based on your impressions of the facts of this case as
20 you knew them and your impressions gained from contact with
21 the defendant, how would you describe him as a person?

22 A As a person?

23 Q Yeah.

24 A Well, he struck me as very cold. He -- you know, I
25 felt that he had average intelligence. The manner in which

1 he discussed the facts of the case and what transpired was
2 very dispassionate. And that left me with an impression.

3 Q He didn't impress you as someone then in discussing
4 the facts of the case that had remorse for what he did?

5 A No.

6 Q Is it not important in a capital case in determining
7 strategy in the sentencing phase to consider what your own
8 impressions of the defendant are?

9 A Oh, yes.

10 Q Would you consider that rather significant
11 information?

12 A Oh, yes, absolutely.

13 Q In other words, if you're getting a certain
14 impression, you've got to consider whether the jury will as
15 well?

16 A Right. Exactly.

17 Q You had conversations with the co-defendants'
18 attorneys in this case; correct?

19 A Yes, I did.

20 Q You were aware from those conversations at least to
21 some extent what the co-defendants were saying about Mr.
22 Bush's involvement?

23 A Exactly. Right.

24 Q Did Mr. Bush ever give you the impression he was
25 afraid of any of the other co-defendants?

1 A NO. NO.

2 Q What was your view based on your review of the facts
3 prior to the sentencing phase of Mr. Bush's role in these
4 three crimes?

5 A What was my view of his role in these three crimes?

6 Q Yes.

7 A Well, I felt that he was --

8 THE COURT: Did you say in these three crimes?

9 MR. BARTMON: I'm saying -- by the three crimes,
10 I mean the robbery, the kidnapping, and the murder, the
11 three convicted crimes in this particular case.

12 THE WITNESS: I felt that the facts demonstrated
13 or indicated to me or left me with the impression that Mr.
14 Bush was the leader of the group, or certainly the best
15 case scenario from his standpoint, at least the co-leader
16 with Parker. But I felt really that he was the lead
17 person.

18 Q And that was based not only on the facts as you
19 understood them from your client, but your review of all
20 the evidence including the co-defendants' statements?

21 A Right.

22 Q Did he strike you at any time either under your
23 impression of the facts or your impression of him
24 personally as a passive or timid person?

25 A No.

1 Q would submissive be a word you would use to describe
2 him under those circumstances?

3 A No, he was very -- he was aggressive. In fact, on one
4 occasion, he called me down to the Martin County Jail and
5 asked me to look into his automobile because he was
6 concerned about his automobile which was impounded. And I
7 always responded to his calls when he wanted me to come and
8 see him. And, of course, I had no way of communicating
9 with him directly until I got to the jail, so I didn't know
10 what the nature of the call was.

11 But he was very adamant about certain things he wanted
12 looked into with respect to his car. Mr. Bush was never
13 hesitant to communicate with me about the case or about any
14 other matters that he felt needed attention from me or
15 anybody else.

16 Q So, in fact, your impression was he was exactly the
17 opposite of a timid person, wasn't he?

18 A Right.

19 Q Would your assessment of him as an aggressive person,
20 certainly wouldn't that be important in terms of now you
21 might think he might come across at the sentencing phase?

22 A Oh, absolutely.

23 Q When you decided -- when you were approaching
24 sentencing phase, you obviously knew the same jury had just
25 convicted him of the crimes. Okay. From a strategy

1 standpoint, you don't want to make the defendant look any
2 worse at that point since the jury has just convicted him,
3 do you?

4 MR. NOLAS: Objection, Your Honor.

5 THE COURT: What's your objection?

6 MR. NOLAS: I'm objecting to the characterization
7 of something as a strategy. He should have Mr. Muschott
8 explain that.

9 THE COURT: Well --

10 MR. BARTMON: I mean, he's asked him about
11 various aspects of his representation and I'm cross-
12 examining him on the same aspects.

13 THE COURT: That's what he's doing. Objection is
14 overruled.

15 BY MR. BARTMON:

16 Q You certainly have no interest in making him look
17 worse at the sentencing phase?

18 A No, absolutely not.

19 Q Isn't it also important in every decision you make
20 about mitigation and evaluating it as to whether or not
21 it's going to, quote, unquote, "open the door," for the
22 State to bring in negative information?

23 A Right. Exactly.

24 Q You were familiar with that aspect of representation
25 that if you brought in certain evidence, the State then may

1 walk through the open door with things that may make the
2 defendant look worse than he already is?

3 A Right.

4 Q That's certainly a crucial consideration in terms of
5 sentencing phase, isn't it?

6 A Absolutely.

7 Q Did you consider it important for you to maintain
8 credibility with the jury at sentencing phase?

9 A I felt that was primary.

10 Q Would it be fair to say that it is a rather
11 destructive thing from the standpoint of credibility with
12 the jury to switch strategies from the trial phase to the
13 sentencing phase?

14 A Yes.

15 Q So it would not be particularly helpful in your view
16 to introduce information which may be totally contradictory
17 to the strategy used in guilt phase?

18 A Right.

19 Q Do you recall in your closing argument urging the jury
20 to listen to some of the latter statements of Mr. Bush to
21 where he had expressed some sense of misgivings about what
22 he did?

23 A Yes, I did. That was actually the cornerstone of my
24 closing argument.

25 Q Which was, if you could elaborate? Could you

1 elaborate on that?

2 A Yeah. He had given four tape-recorded statements to
3 the police. And in the third statement -- and, of course,
4 I had had an opportunity not just to review the
5 transcripts, but to listen to the tapes. In three of the
6 tapes, he sounded hostile and cold about the incident. And
7 I just got a bad feeling myself listening to them.

8 But in the third tape, that third statement that he
9 gave, he really sounded remorseful. And in describing that
10 tape, I always use the word hangdog. He just felt --
11 sounded like he felt real bad about what had happened.

12 That tape was in evidence along with the other four
13 and I asked the jury in closing argument to listen to that
14 tape in the jury room before they made a decision and
15 before they voted.

16 And, indeed, after closings were completed and the
17 instructions were given, the first thing they did when they
18 went back there is they asked for the third tape and a tape
19 recorder. So they did to that extent go along with at
20 least my request in closing argument.

21 Q Had you discussed with Mr. Bush your -- that this was
22 going to be your approach and strategy in terms of closing
23 argument at sentencing?

24 A Oh, yes.

25 Q He was aware of that?

1 A Right.

2 Q Initially, did he have any problems with that that he
3 expressed to you?

4 A No. We have numerous discussions about whether he
5 would testify at the penalty phase. And --

6 Q I mean -- I want to get to that point, but initially
7 there were --

8 A Oh, he had no problems with that.

9 Q -- discussions and you did have discussions along
10 these lines with him?

11 A Right. Yeah, I told him I wanted to ask the jury to
12 play the third tape and that I thought that was the one in
13 which he really sounded remorseful.

14 Q Do you recall at the closing argument arguing to the
15 jury that -- or suggest to the jury that Mr. Bush would be
16 a rather older person when he would be first eligible for
17 parole?

18 A Right. I did. I told them that basically his fate
19 was sealed and I tried to do that as dramatically as I
20 could. And, of course, my thought there was to tell the
21 jury you've done your job now with respect to Mr. Bush.
22 You know, you don't need to go any further with the thought.

23 THE COURT: Let's break for lunch now. Please
24 return at 1:30.

25 (Recess at 12:00 p.m.; reconvened at 1:35 p.m.)

1 chance of that death penalty being overturned on appeal if
2 it was imposed over a life recommendation. So we felt that
3 if and when our cases reached the sentencing phase that it
4 would be important to do everything possible to obtain a
5 life recommendation from the jury.

6 Q When you -- you stated before you were familiar with
7 the prosecutors in this case. Did you believe that the
8 prosecutors were aware of the facts of the prior 1974 crime
9 where Mr. Bush was convicted of rape and robbery?

10 A Oh, yes, they were fully aware of that. Their office
11 prosecuted that case. That was the St. Lucie County case.

12 Q Was it your belief at that time that there might be a
13 certain evidence that the State might try to present at
14 sentencing that they may not try to present at guilt phase?

15 A Yes. Yes. I felt that depending on what we attempted
16 to present at sentencing that the State may attempt or
17 would have attempted to introduce evidence of the details
18 of that crime as evidence which would have been, in my
19 view, extremely detrimental from the defense standpoint in
20 the sentencing phase.

21 Q You were aware of the facts, I think you testified, in
22 that case from speaking with Mr. Schopp?

23 A Yes.

24 Q He was the defense attorney for Mr. Bush in that prior
25 crime?

1 sentencing phase. I also knew that the State Attorney's
2 Office was going to try every possible way to get that
3 evidence in if we left them any avenue.

4 Q So your feeling was, given all the circumstances of
5 that case as you knew it and the factual parallels in terms
6 of the victim and the type of crime involved, would be
7 disastrous in terms of impact at sentencing?

8 A Yes.

9 Q You talked -- did you talk to Mr. -- you related that
10 you had conversations with Mr. Bush's father and his
11 brother. Were they aware -- did you discuss with them
12 mitigating circumstances?

13 A Yes, we discussed the mitigating circumstances. And I
14 went over the statutory mitigating circumstances with them,
15 together with the fact that any other evidence was
16 admissible on that issue. And I basically asked them if
17 there was anything that they felt that they knew of that
18 could be offered in that regard.

19 Q Do you recall what they responded to you on that?

20 A Neither of them could offer me anything that would
21 have been of any benefit to John Bush at the sentencing
22 phase.

23 Q Was either one of them willing to testify at the
24 sentencing phase as you recall?

25 A I told both of them that they could testify if they

1 A That's correct.

2 Q Can you recall the nature of the facts of the crime as
3 he related it to you?

4 A As he related it to me, it was a horrendous abduction
5 and rape. And that the female victim was traumatized, not
6 necessarily physically -- she was physically, traumatized --
7 but mentally to the point that some two or three years
8 after the incident she was still under psychiatric care.

9 And that there were details of that crime which if
10 presented by the State Attorney's Office, in my view, would
11 have been devastating in the sentencing phase of the case
12 to which I was appointed, particularly in light of the
13 degree in which there were similarities, the abduction of a
14 white female, and that type of thing, kidnapping.

15 Q Based on that assessment, you didn't want any part of
16 that conviction coming in beyond the fact of that
17 conviction, did you, in the sentencing phase?

18 A Exactly. I knew that they were entitled to get the
19 fact of the conviction in and that they knew they were
20 going to get that in. I felt that it was in the best
21 interest of my client to hold it to that absolute bare
22 minimum.

23 And I felt that anything that I did that would have
24 risked in any way opening the door to the State to get the
25 details of that crime in would have been disastrous in the

1 sentencing phase. I also knew that the State Attorney's
2 Office was going to try every possible way to get that
3 evidence in if we left them any avenue.

4 Q So your feeling was, given all the circumstances of
5 that case as you knew it and the factual parallels in terms
6 of the victim and the type of crime involved, would be
7 disastrous in terms of impact at sentencing?

8 A Yes.

9 Q You talked -- did you talk to Mr. -- you related that
10 you had conversations with Mr. Bush's father and his
11 brother. Were they aware -- did you discuss with them
12 mitigating circumstances?

13 A Yes, we discussed the mitigating circumstances. And I
14 went over the statutory mitigating circumstances with them,
15 together with the fact that any other evidence was
16 admissible on that issue. And I basically asked them if
17 there was anything that they felt that they knew of that
18 could be offered in that regard.

19 Q Do you recall what they responded to you on that?

20 A Neither of them could offer me anything that would
21 have been of any benefit to John Bush at the sentencing
22 phase.

23 Q Was either one of them willing to testify at the
24 sentencing phase as you recall?

25 A I told both of them that they could testify if they

1 wished if there was something positive that they had to
 2 offer and gave them the opportunity. It's my recollection
 3 that neither one of them wanted to testify. And, if I
 4 remember correctly, I think that John had told me at one
 5 time that he did not want his father to testify, but I felt
 6 that was simply that John did not want to put his father
 7 through the emotional ordeal of testifying under those
 8 circumstances. So I explained to him that if, indeed, his
 9 father had anything to offer that we would have to consider
 10 that as opposed to, you know, his wishes for his father's
 11 emotional condition. But as it turned out, neither one of
 12 them had anything to offer.

13 Q Did you ever have any problems talking to either one
 14 of them?

15 A No.

16 Q Did you talk to them whenever they wanted you to?

17 A Yes.

18 Q Did you ever refuse to meet with either one of them,
 19 the brother or the father?

20 A No.

21 Q I would like to ask you a little bit about the
 22 circumstances under which Mr. Bush testified at the
 23 sentencing.

24 A Okay.

25 Q As I understand it from the record, do you recall that

1 you after his testimony advised the Court that you had
 2 advised Mr. Bush not to testify at sentencing.

3 MR. NOLAS: I object to the leading form of the
 4 question, Your Honor. This is beyond the scope of direct.
 5 If Mr. Bartmon wants to call this witness in that regard, I
 6 have no objection to that, but it should not be done in a
 7 leading manner.

8 THE COURT: The objection is overruled.

9 MR. NOLAS: Thank you, Your Honor.

10 THE WITNESS: Yes. I'm sorry. I forgot the
 11 question.

12 BY MR. BARTMON:

13 Q Do you recall having put on the record after Mr. Bush
 14 testified at sentencing that it had been your
 15 recommendation to him not to testify at sentencing?

16 A Yes. I recall doing that.

17 Q You did, in fact, advise him not to testify?

18 A Yes, I did.

19 Q Could you elaborate on the circumstances under which
 20 you advised him of that?

21 A Yes. After we had developed all the facts in the case
 22 and after the guilt phase was completed, I had, of course,
 23 in my mind how I was going to handle or recommend to Mr.
 24 Bush, to John, how we handle the sentencing phase, even
 25 during the guilt phase.

1 And we had discussed the sentencing phase during the
2 guilt phase. And I had listened to this third tape in
3 which he sounded very remorseful. And he really sounded
4 genuinely sorry for what had happened.

5 And I knew that the State in the guilt phase was not
6 in a position to attempt to prove or even to reasonably
7 argue with any factual basis at all that Mr. Bush was the
8 trigger man. In fact, I know that Ron Wright, the medical
9 examiner, was going to testify that the stab wound
10 inflicted by Mr. Bush was superficial and was not fatal.

11 And I felt that this would put us in a position in
12 which I could argue to the jury, ask them to listen to that
13 third tape in which he sounded genuinely remorseful, and
14 ask them to consider that before they rendered their
15 verdict or voted, as it were, on the death penalty.

16 And this, in my view, gave us two closing arguments,
17 one during the sentencing phase and, really, in effect,
18 that gave us another closing argument back in the jury room
19 with just the jury and John talking to them on the tape.
20 And, really, that was the best that John had ever sounded
21 in terms of remorse and feeling sorry for what he'd done
22 about the case. I felt that was a good strategy and that
23 that would be, you know, the last thing that they would
24 hear before they voted on the case.

25 I knew that Bob Stone was going to use a very

1 emotional aggressive closing argument in sentencing just as
2 he had done in the guilt phase. And I felt that this last
3 exposure to John in the jury room by this tape recording
4 would be good particularly if there was nothing presented
5 beyond the State's bare bones sentencing phase evidence to
6 overcome that or to go against it.

7 So that was my strategy. I discussed it with John and
8 this was one of the things that we were talking about
9 during the entire trial, but particular when we got through
10 guilt phase as to whether he would testify or not. Because
11 the other thing I knew was that if he elected to testify,
12 that they would have him cross-examined by Jim Midelis.

13 Q What was your impression of Mr. Midelis on
14 cross-examination, his abilities on cross-examination?

15 A Well, he's probably the best prosecutor in
16 cross-examination of a defendant that I've ever been up
17 against. And he does an excellent job of it. And I did
18 not feel it was remotely in my client's best interest to be
19 cross-examined by Mr. Midelis.

20 So my recommendation from the beginning was that John
21 not testify. And there were lengthy conversations with
22 John and then with John and his brother and his father
23 because the officers would allow us, the three of us, to
24 speak together there at the bar during breaks and before
25 and after lunch and this type of thing.

1 Q Do you recall at what point Mr. Bush informed you he
2 wanted to testify at the sentencing phase?

3 A Yes. John had made up his mind that he would follow
4 my recommendation and not testify during the sentencing
5 phase. So the State presented their case in the morning
6 and rested and it was a bare bones case. And I think they
7 anticipated that we would present some evidence and they
8 were getting ready, basically, to come back with their -- I
9 felt like their heavy artillery in rebuttal.

10 My strategy --

11 Q Let me just ask you one second. So their bare bones
12 case in terms of aggravating was what you had anticipated
13 they would do and that's, in fact, what happened?

14 A Right. I anticipated a bare bones case of aggravating
15 circumstances with the saving of the heavy artilleries, a
16 lot of which they couldn't use unless the door was opened
17 or unless we presented some mitigating or attempted to
18 present some mitigating evidence.

19 And the beauty of the tape in the jury room was that
20 we didn't open any doors. That was a device that was
21 utilized in closing argument. That tape was already in
22 evidence. And we didn't have to risk anything -- using
23 that device as the strategy in the sentencing phase.

24 So, after a lot of discussions over several days, John
25 had finally come to the -- I think -- to the decision to

1 follow my recommendation and not to testify. So the
2 strategy was that after the lunch break, we would come
3 back, I would stand up and announce that we rested without
4 presenting any evidence in mitigation. And then we would
5 go straight to closing argument.

6 And I had my closing argument designed around that
7 strategy of basically the fact that they had a bare bones
8 aggravation evidentiary case; the fact that the jury had
9 already sealed his fate with 25-year minimum mandatory
10 before he's even eligible for parole; and then ask them to
11 play the tape in the jury room.

12 So we came back from lunch and it was still John's
13 decision not to testify. And we then came from the bar. I
14 think there was some discussion with his father, last
15 minute. I forgot the nature of it.

16 We sat down at the table and the bailiff came in and
17 announced, "All rise." And as we were standing up, John
18 leaned over to me and said, "I've changed my mind. I want
19 to testify." I said, "I don't recommend it." And he said,
20 "I want to testify."

21 Q When he told you that, "I want to testify," you
22 continued to recommend that he not testify?

23 A Right.

24 Q Once he had made the decision to testify, you had to
25 put him on, did you not?

1 A Yes.

2 Q After all, it is the client's call in situations like
3 that, is it not?

4 A Exactly. And I had told John from the beginning, I
5 said, "I am your lawyer and I'll give you advice and I'll
6 make recommendations to you, but you have to make the final
7 decision about certain things." And this was one of them.

8 Q Based on your meetings with Mr. Bush and your
9 assessment of the facts as you knew them involving Mr. Bush
10 in this murder case, why do you think he did choose to
11 testify at the sentencing phase?

12 MR. NOLAS: I object, Your Honor. It's reading
13 another individual's state of mind.

14 MR. BARTMON: I'm asking him for his personal --

15 THE COURT: well, I realize that's difficult to
16 do, but I think we can hear the witness' perception as to
17 that decision, realizing that he can't read his mind. And
18 this is just his perception for what it's worth.

19 THE WITNESS: It was my impression that he did
20 that because he wanted to that extent to be in the
21 spotlight. This had been a high profile case from the
22 beginning. And it had received a lot of publicity. And
23 even during his incarceration, John was aware of the
24 publicity that it had received and, of course, the venue
25 was transferred to Fort Myers because of that.

1 It was my impression that we had gone through the
2 entire trial and he had been seated there and had not had a
3 chance to say anything. And that he simply wanted to be in
4 the spotlight and that was his -- he realized at that
5 moment that that was his last opportunity and he seized on
6 it.

7 BY MR. BARTMON:

8 Q How would you -- strike that.

9 What was your impression of the effect of the
10 cross-examination by Mr. Midelis of Mr. Bush in sentencing?
11 What effect was it?

12 A In my view, it was a complete disaster. It was the
13 worst possible thing that could have happened in the case.

14 Q What was your impression of how Mr. Bush came across
15 as a witness, particularly under cross-examination?

16 A Totally without remorse, ruthless, cold. He stared at
17 the jury, in my view, menacingly. And, you know, this went
18 on for an hour, an hour and a half. It was a disaster from
19 the defense standpoint.

20 Q And that was inconsistent with your desire to convince
21 the jury that at least in one of the statements the
22 defendant had remorse or felt sorry for what he did, was it
23 not?

24 A Right. Right.

25 Q Would you describe his impact or your impression of

1 his impact as that of a passive or submissive person?

2 A On the jury?

3 Q Yeah.

4 A No. No, he didn't come across that way at all. He
5 made the mistake of trying to take on Jim Midelis and
6 that's where Jim is an exceedingly good cross-examiner and
7 prosecutor. Mr. Midelis seems to instinctively know those
8 defendants that are going to want to try to match wits with
9 him. And he is extremely good at baiting them if they're
10 the least bit aggressive and causing them to become more
11 aggressive and hostile on the witness stand.

12 Q Is that what happened in this situation?

13 A Yes, he did. He caused John to become hostile. He
14 caused him to become aggressive and it came across in a
15 very negative way from the defense standpoint to the jury.

16 Q You were stating on direct examination that when you
17 met with Dr. Tingle you had told him all that you knew
18 about the facts, your impressions. Did you also talk to
19 him about your impressions of Mr. Bush's person?

20 A Yes, I did. I told him what my impressions were and
21 that he impressed me as a cold person. He described the
22 crime in dispassionate, ruthless terms. And I gave him all
23 the information that I had about it.

24 Q Did that information go to facts of the case of Mr.
25 bush's involvement as you knew it at that time?

1 A Yes.

2 Q Did you make him aware of the existence of Mr. Bush's
3 prior record, prior conviction, if you can recall?

4 A Of the facts of the prior conviction?

5 Q The fact that he had a prior conviction.

6 A Yes, I did.

7 Q Was there a discussion between you and Mr. Tingle of
8 both the -- strike that.

9 Did you discuss what the two of you felt in
10 consultation with each other based on review of this
11 material might be the down-side of such an evaluation of
12 Mr. Bush?

13 A Well, we did. After reviewing all the facts and all
14 the information that I could provide to Dr. Tingle, he
15 basically indicated that he didn't feel there was anything
16 positive that he could offer in terms of psychiatric
17 testimony, either in terms of competency, guilt phase,
18 or --

19 Q In terms of mitigation?

20 A -- terms of mitigation.

21 And that in all likelihood that the evidence that
22 would have been developed through the psychiatric
23 evaluation would have been to the contrary, that it would
24 have been adverse to mitigation; that Mr. Bush was in a
25 leadership position in the crime; that he did not feel

1 remorse, there was a lack of remorse; that the likelihood
2 of rehabilitation was not good, that type of thing.

3 Q Was part of your discussion involved -- did you
4 discuss with him what you knew of Mr. Bush's involvement
5 from what his co-defendants had said?

6 A Yes.

7 Q Did you know Dr. Tingle to be involved in any other
8 similar proceedings prior to the time you met with him on
9 this case?

10 A Yes, he had been involved in a number of criminal
11 cases in the St. Lucie County area, particularly because
12 early on, he and Dr. Raden were the only two psychiatrists
13 in Indian River County, and there were no psychiatrists in
14 St. Lucie County.

15 And in terms of court appointments to criminal cases,
16 he and Dr. Raden were about the only two that were even
17 eligible for appointment. So he had been involved in
18 numerous criminal cases prior to this case.

19 Q Did that go into your thinking in terms of asking for
20 his appointment initially?

21 A Oh, yes. Uh-huh.

22 Q What other factors did you use to ask for that
23 specific doctor?

24 A Well, I asked for Dr. Tingle specifically because in
25 my experience, he was a person who was more sympathetic to

1 the defense than Dr. Raden. He had a reputation for being
2 more liberal, if you will, in terms of the defense position
3 than Dr. Raden. And I knew that his credentials were good
4 and I knew that he made a good witness. And I knew that he
5 had been involved in prior criminal cases so he had
6 experience.

7 Q So then any information or indications he gave you of
8 a negative character in terms of what he could do for your
9 client, given what you knew about his reputation as
10 sympathetic to the defense, would be significant, wouldn't
11 it?

12 A Oh, yes. Uh-huh.

13 Q Do you ever recall Dr. Tingle saying that he didn't
14 want to be involved or wasn't interested in pursuing this
15 matter?

16 A No. He indicated after it was all said and done that
17 he didn't see that there was anything that he could do for
18 Mr. Bush, but he never said he didn't want to be involved.

19 Q At the conclusion of your discussion with him, was
20 there anything you felt that was capable of development
21 from the standpoint of proceeding with the evaluation that
22 would aid you in terms of mitigating circumstances?

23 A No, I didn't see anything that would have been of any
24 benefit, that would have -- from the standpoint of positive
25 mitigating evidence, that wouldn't be otherwise outweighed

1 by the potential negative aspect.

2 Q If mitigating evidence had been presented from the
3 standpoint of passive, that the defendant was passive, in
4 your view, would the State have tried to get in the
5 co-defendants' statements?

6 A Oh, yes.

7 Q Do you recall the nature of those statements and what
8 the other defendants said about Mr. Bush's involvement?

9 A Well, of course, Parker at one point said that Bush
10 was the shooter, but you know, that part didn't concern me
11 because I didn't think the State was ever reasonably going
12 to take that position because I didn't think that was the
13 evidence and I didn't think they needed to.

14 But there was more -- I had more concern over the fact
15 that there were statements to the effect that Mr. Bush had
16 said during the course of the abduction and prior to the
17 murder that, "We need to get rid of the victim," because he
18 -- it was either he or his brother had gone to prison once
19 before because they didn't get rid of the victim, and that
20 wasn't going to happen again.

21 And other statements to the effect that, you know,
22 he's been in prison and he's not going back. And the types
23 of statements that would have shown far greater intention
24 and involvement in the ultimate homicide that was really
25 demonstrated in the guilt phase and in the State's bare

1 bones sentencing phase.

2 Q Did you regard those statements as conveying a
3 cold-blooded person?

4 A Oh, yes. Yes. You know, the decision that we're
5 going to have to kill this person just so they won't be a
6 witness against us, that, to me, would have been
7 devastating, particularly in view of the prior crime.

8 The fact that the victim there -- the State, Bob
9 Stone, would have argued very strongly that what happened
10 was, in the prior case, the victim was allowed -- or was
11 not killed, and subsequently Mr. Bush was tried and
12 convicted. And then, of course, Stone's argument would
13 have been, you know, Mr. Bush wasn't going to let that
14 happen again. None of the other three defendants had that
15 type of factual situation in their background that Mr. Bush
16 did.

17 Q In your perception of the prior records of all four
18 defendants, did Mr. Bush have the worst prior record of the
19 four?

20 A I think so. Yeah. Yeah, he did have the worst
21 because he had that 30-year penalty.

22 Q Did you feel from the facts or the crime and Mr.
23 Bush's involvement as you knew it that he had any sort of
24 problems with intelligence?

25 A No. No, as a matter of fact, he had -- if the

co-defendants' statements were true -- had the ability to recognize during the course of the abduction that this scenario was beginning to be played out similar to what had happened to him and sent him to prison before. And that if he made the statements that they claim that he made that he stated that they would have to kill the witness to avoid a recurrence of his prior conviction.

Then, of course, after the incident, the murder weapon, I think, he took to his brother's house and then later apparently when the case got more publicity, went back and retrieved it and threw it, by his statement, threw it into Taylor Creek. It was never recovered, but he testified that he disposed of the murder weapon.

So that indicated to me that he was functioning with normal intelligence to realize what had occurred and what possible steps he could take to avoid detection and arrest.

Q Did that, in your view, show an ability to appreciate the criminality of his conduct?

A Yes.

Q In terms of -- do you recall that he gave his -- one of his statements against his attorney's advice at that time, I believe Mr. Schopp's advice?

A Yes. He gave a statement to Sheriff Holt contrary to Mr. Schopp's advice. And I think that was the fourth statement.

Q Do you recall if he initiated the contact with the sheriff or did the sheriff initiate contact?

A That was initiated by Mr. Bush. And it's my recollection that he sent word through the jail personnel that he wanted to tell his story directly to Sheriff Holt. And Sheriff Holt stated that he wouldn't speak with Mr. Bush until his lawyer was present.

Mr. Schopp was summoned and if I remember the information correctly, Mr. Schopp advised him not to make a statement. Mr. Bush gave Sheriff Holt a statement against his lawyer's recommendation and, again, I think, to be in the spotlight, that he had an opportunity to talk directly to the sheriff himself.

Q Do you recall what your impression was in terms of Mr. Bush's demeanor, character, personality when you reviewed the facts of him being stopped by the police in Indiantown after the murder was committed? Do you recall those facts?

A Yes. He was stopped by Deputy Tim Vargo. And this was in a remote portion of western St. Lucie County. And they were on their way back to Fort Pierce.

The murder was committed on State Road 76 in Martin County and then they had driven on down, I guess, to Indiantown which would have been another 15 or 20 miles and then come back up through the western part of the county on a road called Glades Cutoff Road.

1 And they were pulled over by Deputy Vargo and the
2 facts that developed were that -- of course, when they were
3 being pulled over, they had no way of knowing exactly what
4 it was for or whether it was related to what had just
5 happened. There was apparently some discussion about
6 whether they should shoot the deputy at that time and Mr.
7 Bush indicated, if I remember correctly, "Let's just wait
8 and see what happens."

9 And from Deputy Vargo's testimony -- Deputy Vargo was
10 deposed at length -- he testified that Mr. Bush was calm,
11 cool, and collected. And that he pulled him over for a
12 defective tail light and that he simply pulled him over and
13 asked to see his driver's license and registration. And
14 that Mr. Bush produced his driver's license and
15 registration and in all respects acted normally and did
16 absolutely nothing to call any suspicion upon himself or
17 the other three defendants that were in the vehicle with
18 Mr. Bush in a situation in which it would have taken very
19 little to call suspicion to them because I think by that
20 time it was about 3 or 4:00 in the morning. And they were
21 out there on Glades Cutoff Road with no apparent
22 destination or evidence of where they had been.

23 And, apparently, he handled himself very calmly and
24 collectively in spite of the fact that the victim had been
25 murdered within an hour of that period of time.

1 Q The time frame to you in terms of the murder and the
2 stop by the police was significant in terms of his mental
3 state, wasn't it?

4 A Sure. And Deputy Vargo just gave him a warning on the
5 defective tail light and sent him on his way. And then I
6 think there was a second traffic stop down the road when
7 there was some problem that came back on the computer with
8 the registration.

9 Q Do you recall the facts -- do you recall that the
10 defendant accepted the proceeds of the robbery money after
11 they had stopped at his brother's house to leave the gun
12 off?

13 A Yes.

14 Q Do you recall if Mr. Bush was identified as the person
15 who actually physically took the money from the store when
16 they robbed the store?

17 A I frankly can't recall whether Bush -- whether John
18 was identified as that person or not. I just simply can't
19 recall.

20 Q Do you recall whether Mr. Bush owned the gun or the
21 car that was involved?

22 A Yes. He owned the car and the gun.

23 Q Were those significant facts to you in terms of
24 possible mitigating circumstances?

25 A Oh, sure. Absolutely. I mean, those were the

instrumentalities of the crime. And, of course, Mr. Bush was driving the car. It was his car and he was driving.

Q Would it be significant in your view -- strike that.

Do you recall --

MR. BARTMON: One moment, Your Honor. May I have a moment?

THE COURT: Yes.

(Pause in the proceedings)

BY MR. BARTMON:

Q Knowing what you knew about the prior crime and Mr. Bush's participation in it, that combined with the facts we're just been going over that you were aware of in terms of his involvement in this crime, would you expect the State to have attempted to re-emphasize and stress those over and over had you produced mitigation of good character?

A Absolutely. I felt that we were walking a tight rope with respect to any attempt to present evidence on mitigation and that the State was just waiting, you know, with a lot of heavy artillery for us to do anything that would open the door and let them use any of that evidence or testimony.

Q Would the impact of opening the door have created a much greater case for the State than a bare bones case in terms of the presentation of aggravating circumstances?

A In my view, it would. And I really didn't see in terms of aggravating circumstances other than the bare judgment and sentencing in the prior offense that they were able to present that much more in the sentencing phase than they had already presented in the guilt phase.

So, it was sort of a -- the physicians' credo of, you know, first do no harm and then see what good can be accomplished. And I wanted to make sure first that I didn't make my client's case any worse in sentencing than it already was.

And then the next question to be addressed is, without making it worse, can it be improved? And that's what I developed and I had this quite a bit prior to trial. That's when I began to develop the strategy of using the third tape which is the one in which John really sounded good. He sounded good on that tape.

Q You were asked on direct testimony about evidence of the defendant's drinking. Do you recall whether or not the defendant admitted he knew what he was doing in his statements to the police?

A All four statements he admitted that he knew what he was doing.

Q Do you recall whether he admitted he knew what he was going at the sentencing phase when he testified?

A I believe he did.

1 Q Would your impression of the stop you were speaking of
2 before by Officer Vargo lead you to believe that he was
3 drunk at the time of the crime?

4 A No. That was one of the key things in my mind that
5 the State would have presented. There wasn't even enough
6 alcohol on his breath or any impairment of his faculties to
7 cause Vargo to even go so far as to give him any roadside
8 tests.

9 Q Do you view that to be a significant fact in terms of
10 whether he was intoxicated at the time of the crime?

11 A Very significant because this is a late night stop by
12 a deputy and I know from experience in law enforcement,
13 particularly road officers, that in any late night stop
14 situation, one of the first things they're going to look
15 for is to determine whether the driver is under the
16 influence and that would be appropriate to make a DUI
17 arrest or at least to give roadsides. And it's been my
18 experience that they give roadsides if there's any
19 indication of alcohol on the breath or impairment of
20 faculties.

21 Q Would that not have been significant in terms of your
22 analysis of the mitigating circumstance of appreciating the
23 criminality of conduct and being able to perform that
24 conduct?

25 A Absolutely. And, of course, that, you know, I felt

1 that if we tried to present something like that and the
2 State rebutted it with that type of evidence, that that
3 would harm our credibility with the jury.

4 Q Did you feel the same way about the effect of that on
5 the mitigating circumstance of extreme mental or emotional
6 disturbance?

7 A Exactly. I felt that it would harm our credibility
8 with the jury and I felt that by the time we got to the
9 sentencing phase, the credibility with the jury was
10 paramount.

11 And that it was incumbent on me to try to make the
12 jury believe that John Bush was sorry that this happened,
13 and to do that without opening the door or the Pandora's
14 box to a lot of evidence by the State that would convicted
15 them that he wasn't sorry it happened and that he probably
16 would do it again.

17 Q Was it -- would it not be -- strike that.

18 Do you recall, based on your understanding of the
19 facts of the prior rape and robbery in 1974, whether there
20 was any evidence that Mr. Bush was drinking or was
21 intoxicated at the time?

22 A I don't recall any evidence of intoxication in that
23 incident.

24 Q Do you think the State could have used that absence of
25 intoxication in prior crimes in combination with the

1 absence of intoxication in this crime to rebut any attempt
2 to show mitigating circumstances of extreme disturbance or
3 appreciation of criminality of conduct?

4 MR. NOLAS: I object, Your Honor. The witness
5 didn't say there was an absence. He said he didn't recall.
6 He didn't say absence of evidence.

7 MR. BARTMON: Can I rephrase, Judge?

8 THE COURT: Rephrase.

9 BY MR. BARTMON:

10 Q Assuming there was evidence in the 1974 trial that
11 there was no evidence of intoxication or drinking and the
12 State used that in combination with the absence of that
13 evidence in this case, what kind of impact would that have
14 on mitigating circumstances of emotional disturbance or
15 appreciation of criminality of conduct?

16 A There was no doubt that the impact would have been
17 very negative. It would have been very bad for the
18 defense, you know, to attempt to show anything like that
19 because of that.

20 Q Based on your review of the evidence in this case and
21 review of the 1974 facts as you understood them and your
22 impressions of the defendant, did he ever indicate to you
23 or did you ever perceive any trouble or any difficulty that
24 the defendant may have had in being understood when he
25 spoke?

1 A When he spoke?

2 Q When he spoke.

3 A No, he was understood when he spoke. He was always
4 understood when he spoke. I mean, he told the jail
5 personnel he wanted to talk to Sheriff Holt and they got
6 Sheriff Holt over there to talk to him.

7 Q The statements in your memory, the statements he gave
8 to the police, did that indicate any problems with the
9 police understanding what he meant or he understanding what
10 they meant?

11 A No, he didn't have any problem communicating at all.
12 In fact, he wanted -- when he was first in custody before
13 he was actually arrested, there was some talk about a
14 possible alibi in West Palm Beach. And he took them down
15 there and showed them various places. And there was no
16 problem communicating there.

17 As a matter of fact, when we came over to Fort Myers
18 to try the case, before the trial started, they had brought
19 Mr. Bush up to the holding cell and for some reason they
20 brought his suit over, but they hadn't brought his shoes
21 over. And he made it very clear to people, to the officers
22 -- custodial officers that he was flat not going into the
23 courtroom without his shoes on.

24 And I was summoned in there because of this problem.
25 And, of course, I understood that and I told them, I said,

1 you know, "Go get the man's shoes. He's on trial here,"
 2 which they did. But he appreciated that and communicated
 3 that to them before I ever got there.

4 Q Do you recall based on your impression of the evidence
 5 and your impressions of the defendant and the facts as you
 6 knew them and investigated them whether there was any
 7 indication that the defendant was out of touch with reality
 8 at any time during the crime?

9 A No, there was no indication of that.

10 Q This crime, I mean, 1982.

11 A Right.

12 Q No indication whatsoever?

13 A No.

14 Q Do you believe that the facts of the disposal of the
 15 weapon show that the defendant understood the incriminating
 16 nature of his conduct during the crime?

17 A Yes.

18 Q How so?

19 A Well, the weapon he realized was the instrument of
 20 death. And he had an appreciation of the fact that if a
 21 bullet was recovered or a slug was recovered that it could
 22 be traced to his gun ballistically. And that if he
 23 disposed of that, that would be one less item of potential
 24 evidence that could be detected and used against him.

25 Q If you had -- strike that.

1 Assuming that the defendant had a record in prison
 2 during his incarceration for the prior crime that included
 3 approximately 26 disciplinary reports in a three-year
 4 period. Assuming further that the Sumter Correctional
 5 Institute ultimately sought to transfer Mr. Bush from that
 6 prison because he was an extreme disciplinary problem. And
 7 assuming that you had presented it or there was information
 8 that presented Mr. Bush was passive. Wouldn't you have
 9 been concerned about the State's use of that possible
 10 evidence --

11 MR. NOLAS: I object to that -- I'm sorry.

12 BY MR. BARTMON:

13 Q (Continued) -- would it be significant in terms of Mr.
 14 Bush's character if you were aware of that kind of
 15 information?

16 MR. NOLAS: And as I indicated, I object, Your
 17 Honor. This is precisely what Strickland cautions against.

18 THE COURT: Well, there is no indication that he
 19 was ever aware of that.

20 MR. NOLAS: Right.

21 THE COURT: So I think he'd be speculating now at
 22 this point and using hindsight and quarterback -- Monday
 23 morning quarterbacking, whatever you want to call it, if I
 24 were to permit an answer. The objection is sustained.

25 MR. BARTMON: Okay, Your honor.

1 BY MR. BARTMON:

2 Q Was it significant in your view that the only common
3 denominator person in both crimes was John Earl Bush?

4 A Right.

5 Q Wouldn't the State have been able to emphasize that
6 had you brought -- had there been testimony introduced
7 about Mr. Bush's character?

8 MR. NOLAS: Objection, Your Honor. Same
9 objection.

10 THE COURT: This is information that he had in
11 the past.

12 MR. NOLAS: Mr. Muschott indicated he didn't have
13 that type of information. And now we're asking --
14 basically rephrasing the same kind of --

15 THE COURT: No. We're not talking about his
16 record in prison. Maybe I misunderstood your question.
17 Repeat the question.

18 BY MR. BARTMON:

19 Q Would it have been significant -- let me ask it a
20 different way.

21 Would it have been significant for the State to be
22 able to show that the only common denominator person in the
23 1974 crime and this crime was John Earl Bush of those that
24 were involved in those two crimes?

25 A Yes. I felt that was significant in that it would

1 have opened the door for the State to bring in a lot of
2 details of the '74 crime had we attempted to present
3 evidence, for example, that Mr. Bush was passive as opposed
4 to otherwise, or even evidence of good character.

5 And I was very concerned that anything that we did,
6 they would have been waiting to pounce on in rebuttal to
7 bring in facts of the prior crime and then also in some
8 instances, other evidence relating to the same incident
9 which they hadn't gotten in on the initial sentencing case.

10 Q Were you aware in any of your conversations with Mr.
11 Schopp who represented Mr. Bush in the 1974 trial, was
12 there any indication that at any time Mr. Bush had
13 indicated that the victim had consented to the sex in that
14 crime?

15 A No.

16 Q Was there any indication from Mr. Schopp that Mr. Bush
17 desired to have that as a defense to that crime?

18 A I think he did indicate that there was some talk about
19 that as a defense, but it was just simply not there in the
20 facts. And that this was what led to the discussion about
21 the fact that the witness, you know, was -- or the victim
22 in that case was traumatized to the extent, you know, that
23 she was still undergoing psychiatric therapy three or four
24 years after the incident.

25 Q Would it be possible -- was it part of your

1 consideration that the State could have argued if they got
2 the facts of the 1974 crime in that the defendant didn't
3 learn anything from that time until the time he was
4 convicted of being involved in the murder of Frances
5 Slater?

6 A Sure. That was the whole point, that they would have
7 then said the first imprisonment didn't do any good, the
8 second imprisonment isn't going to do any good, you've got
9 to recommend the death penalty. The argument goes without
10 saying. It would have been a very difficult argument to
11 overcome.

12 Q You were asked on direct examination about
13 considerations of whether the -- whether you were aware of
14 the defendant's problems in prison with being raped. And I
15 believe you said that he had indicated to you he had some
16 of those problems in prison. Would it be possible for the
17 State if you presented that sort of evidence -- let me ask
18 you this.

19 You understand that there's only two choices the jury
20 has, life imprisonment or death?

21 A Right.

22 Q Isn't it possible that if you present evidence of rape
23 in prison and of problems the defendant had in prison
24 you're running the risk of the State arguing that to the
25 effect that he was raped in prison, he doesn't like prison,

1 you have two choices, in fact, it might be used by the
2 State to convince the jury to give him the death penalty.

3 A Sure.

4 THE COURT: Did you have any of those type of
5 thoughts back at that time? Not now, but at the time.

6 THE WITNESS: Yes, sir, I did. The fact that
7 John had indicated to me that he had problems in prison,
8 that he didn't like prison, and it occurred to me that to
9 argue that then would open the door to the State to argue
10 that that meant that he was not going to go back to prison
11 again, even if it meant killing the victim who would have
12 been a witness against him.

13 BY MR. BARTMON:

14 Q You were aware of evidence of an incident where a
15 gentleman named Richard Douglas -- let me ask it a
16 different way. Let me rephrase.

17 Do you recall an incident you became aware of in
18 becoming aware of the facts of the night in question where
19 an individual named Richard Douglas was mugged in Jensen
20 Beach by the four defendants?

21 A That's right. That was not -- they didn't get that in
22 during the guilt phase. And Judge Trowbridge ruled that it
23 didn't meet the Williams rule test.

24 Q And did you consider in terms of presenting good
25 character evidence that the State would have then had an

1 open door to rebut that good character including getting in
2 that evidence of that prior mugging?

3 A Right. And the fact that there was an ongoing
4 criminal activity on the part of all the defendants that
5 night.

6 MR. BARTMON: One moment, Your Honor?

7 (Pause in the proceedings)

8 BY MR. BARTMON:

9 Q You were asked on direct examination about Georganne
10 Williams' visit to the prison and a statement by Parker to
11 her. Do you recall that another aspect of Mr. Parker's
12 statement to Georganne Williams was that, "With John's
13 prior record, it will all fall on him," or something to
14 that effect?

15 A I think so. I think I do recall that.

16 Q Do you recall that in relating that statement to Mr.
17 Bush that Mr. Bush -- Georganne Williams, I mean, relating
18 that statement to Mr. Bush -- that Mr. Bush responded,
19 "Keep it quiet"?

20 A Right.

21 Q Would you -- did you attribute any significance to
22 that response by Mr. Bush in terms of the appreciation of
23 the criminality of his conduct, the appreciation of his
24 prior record, and what impact it might have?

25 MR. NOLAS: Object, Your Honor. It's the

1 appreciation of the criminality of his conduct at the time
2 of the offense, not months later when a statement is made.
3 Now we're getting into competency type questions again.

4 THE COURT: When was that statement?

5 MR. BARTMON: It was made eight days after the
6 murder, Your Honor, if I'm not mistaken.

7 THE COURT: I don't understand your objection,
8 Mr. Nolas.

9 MR. NOLAS: The appreciation of the criminality
10 of his conduct in that regard involves a statement made
11 after the offense. The issue here is his understanding at
12 the time of the offense itself.

13 THE COURT: All right. And that's --

14 MR. BARTMON: I think the witness testified he
15 was aware of those facts when he was -- during sentencing.
16 I'm not asking him of something he wasn't aware or asking
17 him to assume anything.

18 THE COURT: So your question is merely was he
19 aware of those facts?

20 MR. BARTMON: And what -- yes. And to pursue
21 that, yes.

22 MR. NOLAS: I have no objection to was he aware
23 of it.

24 THE COURT: I think he's already testified that
25 he was.

What's your next question?

BY MR. BARTMON:

Q In your awareness of that, what would that say to you in terms of the defendant's appreciation of the criminality of his conduct and whether he could perform that conduct?

A Well, you know, that indicated to me that he was aware of the criminality of his conduct and what he had done. And what was necessary to attempt to avoid prosecution or at least to avoid any additional evidence of the crime, you know, coming to the attention of a prosecutor.

Q Would it be correct -- would it be a fair statement that in view of all of the evidence you were aware of from the '74 crime and from the '82 crime and from your impressions of the defendant that, when you considered the mitigating circumstances of extreme mental or emotional disturbance, or appreciation of criminality of conduct, or ability to perform conduct, you felt there was just no evidence to support that?

A I didn't feel there was. And any slender reeds that could have even remotely been developed in that area, I felt, were far outweighed by what the State would have brought back in rebuttal.

And the disadvantages or the negative aspects would have far outweighed any remotely possible beneficial effect. I felt that the strategy that I had devised to

work up some sympathy for Mr. Bush from the jury during the sentencing phase was something that we could do very effectively and do it without any risk at all. And, indeed, they did at least take the tape and listen to it. To that extent, my strategy was a success.

Q Do you think it would have been helpful to compare John Earl Bush and Frances Slater as victims to the jury?

A No, I think that would have been a big mistake. I wouldn't have wanted to have listened to Bob Stone's response to that from my client's standpoint.

Q Were you aware -- sure that.

Did you consider in mitigation attempting to argue --

MR. BARTMON: Could I have one moment, Your Honor? I'm sorry.

(Pause in the proceedings)

MR. BARTMON: I have no further questions.

THE COURT: Do you have any redirect?

MR. NOLAS: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. NOLAS:

Q Do you recall telling the jury at the penalty phase that there was a burden on the defense with regard to proving mitigating circumstances?

THE COURT: Do you have just one question?

MR. NOLAS: I'm sorry, Your Honor?

THE COURT: Do you have just one question?

MR. NOLAS: No, I was packing.

THE COURT: Then use the lectern.

MR. NOLAS: I wanted to save time here.

THE WITNESS: I'm sorry.

BY MR. NOLAS:

Q Do you recall telling the jury at the penalty phase in your argument that there was a burden that needed to be established with regards to establishing mitigating circumstances?

MR. BARTMON: I'm going to object because that's argumentative. It assumes facts not in evidence.

THE WITNESS: I don't have any specific recollection.

BY MR. NOLAS:

Q Do you remember what you told the jury with regard to the standard of proof on the defense in terms of establishing mitigating circumstances?

A I have no specific recollection of what I told them in that regard.

Q What is the standard of proof on the defense with regard to establishing mitigating circumstances?

A Well, to the best of my recollection -- and it's been a while since I've tried this case -- it was just preponderance.

Q Did you have any live witness testimony, any documentary evidence, anything prepared that could have been presented at the penalty phase?

A No.

Q You indicated, I think, during Mr. Bartmon's examination that that had been relayed to Mr. Bush?

A That I had nothing prepared?

Q Right.

A Yes. Uh-huh.

Q Would it be fair to say that the only affirmative defense evidence at the penalty phase was Mr. Bush's testimony?

A As it turned out.

Q And before he testified, did Mr. Bush know that if he didn't testify, there would be no affirmative evidence presented?

A Yes. Mr. Bush --

THE COURT: Had you told him of your strategy about using the tape, the third tape, or emphasizing that and your concern for his demeanor? Or did you have a concern for his demeanor if he testified?

THE WITNESS: Yes, I did.

THE COURT: I think you've already told us that. Did you tell Mr. Bush about that?

THE WITNESS: Yes, sir. That was the keystone of

1 the sentencing phase strategy. And early on -- once I
 2 heard that tape for the first time, I felt that this was --
 3 gee, this is the best evidence so far that we've got that's
 4 really going to work up some sympathy for John Bush and
 5 that really shows any indication that he felt a lot of
 6 sorrow and remorse for what had happened. And I thought
 7 that this is something that we could use.

8 And then as the case developed, I felt that it
 9 would be in John's best interest to utilize it in the
 10 fashion that I've explained previously and we could do this
 11 without any risk to him, that the State would not come back
 12 in rebuttal with any negative evidence that would be really
 13 harmful to him.

14 And at the same time, not only is it a no-risk
 15 situation, but it's a situation where you, in effect, get
 16 two closing arguments, one in front of the jury and, of
 17 course, we would then have first and last. That was a
 18 third benefit that we would have gotten.

19 We would have had first and last. And then we
 20 would have had even the last word beyond that back in the
 21 jury room. And I felt that in order to accomplish this, we
 22 had to basically do it that way, not present anything, but
 23 use the tape and ask them to listen to it.

24 And I explained to him what that would consist
 25 of. And, again, he understood that if we followed that

1 strategy that nothing would be presented. We would just
 2 use closing arguments after the state had presented their
 3 bare bones aggravating circumstance case.

4 BY MR. NOLAS:

5 Q Mr. Bush had told you about his prison background?

6 A Yes.

7 Q He told you about the circumstances attendant to that?

8 A Right.

9 Q He had also told you, I assume, some things about his
 10 family background?

11 A Right.

12 Q He had also told you some things about his educational
 13 background, I assume?

14 A Right.

15 MR. BARTMON: Object. That's beyond the scope of
 16 cross.

17 THE COURT: Well, to be honest with you, I'm not
 18 sure whether you got into that. I don't remember getting
 19 into that. You certainly got into it in your direct. It's
 20 seems like we're just going through matters that we've
 21 already heard.

22 MR. NOLAS: I'm sorry. I was just laying -- I
 23 was just laying the predicate, Your Honor.

24 BY MR. NOLAS:

25 Q He told you about his background?

1 A Sure.

2 Q And as you indicated to the judge, he was aware of the
3 fact that no evidence was going to be presented at the
4 penalty phase?

5 MR. BARTMON: Objection. Asked and answered
6 several times.

7 THE COURT: What are you getting at? We've heard
8 all of this.

9 MR. NOLAS: I'm sorry, Your Honor.

10 THE COURT: We've heard all of this. This is
11 just repetitious and not really directing to anything that
12 was on cross that I can see. If you have a point, make it.

13 MR. NOLAS: Yes, Judge.

14 BY MR. NOLAS:

15 Q After Mr. Bush was cross-examined, do you recall doing
16 any redirect examination?

17 A I believe I did, but I don't recall specifically what
18 it consisted of.

19 Q By the way, when Mr. Bush told you that he was going
20 to testify, did you ask the judge for time to confer with
21 him?

22 A No, I didn't. We just proceeded at that point. And I
23 indicated to him before he went on the stand that, you
24 know, I didn't have any direct prepared so that it was
25 going to be brief and he concurred. And we proceeded.

1 Q Did you after he testified -- his father was in the
2 courtroom during those proceedings, was he not?

3 A Yes.

4 Q Do you recall after he testified speaking to his
5 father about whether his father wanted to testify?

6 A After he testified?

7 Q Yeah, or during the course of -- right after that
8 decision was made.

9 A Well, after that decision was made, then he was on the
10 stand, so I had no opportunity to talk with his father.

11 Q Can you tell me specifically -- you indicated during
12 Mr. Bartmon's examination that you spoke to Dr. Tingle
13 about your perception of Mr. Bush as cold, something along
14 those lines?

15 A Right.

16 Q Did you ever --

17 THE COURT: His perception of what?

18 MR. NOLAS: Of Mr. Bush as cold.

19 THE COURT: As cold?

20 MR. NOLAS: Yes, Your Honor.

21 BY MR. NOLAS:

22 Q Did you ask Dr. Tingle what could be developed to
23 explain that impression?

24 A Well, we discussed what types of analyses Dr. Tingle
25 would go through and there was nothing in the course of

1 that discussion that indicated that he could develop
2 anytning beneficial to explain why, you know, I had that
3 impression.

4 Q would it be fair to say that the discussion with Dr.
5 Tingle was kind of cursory, it was kind of a summary
6 discussion?

7 MR. BARTMON: Objection. This has been asked and
8 answered.

9 THE COURT: I think so. Objection is sustained.

10 BY MR. NOLAS:

11 Q Out of the half hour that you spoke to Dr. Tingle, how
12 much of that time was devoted to insanity, a discussion of
13 insanity?

14 MR. BARTMON: Objection. That's beyond the
15 scope.

16 THE COURT: Well, I think you did get into --
17 very briefly, however. Didn't you have some questions
18 concerning --

19 MR. BARTMON: About the mitigating circumstances.
20 If that's what his question is directed to, I don't --

21 THE COURT: Well, I think indirectly it is by
22 wanting to know how much of the half hour was concerning
23 insanity. So it indirectly, I guess, it goes to that.
24 I'll hear it.

25 THE WITNESS: I would say less than ten minutes.

1 Probably about five minutes, maybe a little more.

2 BY MR. NOLAS:

3 Q And how much of that was devoted to competency?

4 A Competency, I think, probably was about the remaining
5 one-half of the remaining time, which would have been 20,
6 25 minutes. We spent about half that time on competency.
7 Maybe a little less than half.

8 Q A little less than half of 25 minutes?

9 A Right.

10 Q How much --

11 A Dr. Tingle -- excuse me. I don't mean to interrupt
12 you.

13 Q That's all right.

14 A He billed me for half an hour. My frank recollection
15 is we spent a little bit more time than that.

16 Q Do you have any notes in your file regarding the
17 discussion with Dr. Tingle other than the one I showed you
18 earlier?

19 A I've reviewed my file and I don't.

20 Q Were you aware of the fact that the judge at the time
21 he sentenced Mr. Bush on the 1974 case stated -- and I'm
22 quoting, Your Honor, from that record -- "All right. I
23 want you to listen to what I have to say. You have been
24 convicted of rape. There is a minimum sentence in rape
25 cases regardless of your age of 30 years. If I had the

sole say-so, I would not sentence you to that long a period, but I have no alternative."

Did you ever become familiar with that statement by the sentencing judge?

A No, I wasn't aware of that.

Q Would that have been something relevant, something significant to know at the time?

MR. BARTMON: Objection. He just stated he has no recollection.

THE COURT: He said he was not aware of it. Now the question is what?

MR. BARTMON: I'll withdraw the objection, Judge.

MR. NOLAS: Let me rephrase that, Your Honor.

BY MR. NOLAS:

Q You indicated that -- I think Mr. Bartmon asked you that Mr. Bush had something -- was the person in common in these two cases?

A Right.

Q He would have to be the one person in common; isn't that fair? He's the defendant on trial?

A Sure.

Q Were you aware of the fact that Mr. Cave had a rape conviction?

A No, I don't think I was aware of that.

Q Were you aware of the fact that Mr. Parker had a

BY MR. NOLAS:

Q Based on your understanding of the law, does a capital defendant in Florida have the right to confront State's evidence at the penalty phase?

A It was my understanding that they would have been in a position -- I know they had the other defendants under subpoena for our trial. And, of course, from a self incrimination standpoint, I knew that none of them would be permitted to testify by their lawyers because we were the first trial.

But it was my impression that they would attempt to use the statements if they couldn't elicit testimony from the co-defendants. And I was concerned that the statements might get in.

MR. NOLAS: My question for the record, Your Honor -- I don't think the court reporter got it -- was, based on your understanding of the law in Florida, does a capital defendant have confrontation rights at the penalty phase? That was the previous question I asked.

THE WITNESS: My understanding is he does.

BY MR. NOLAS:

Q And are those the same as at the trial level?

A My understanding was at the time that they were the same, but I was concerned that the statements might be used if the defendants refused to testify on the grounds of self

1 incrimination, and that it would be considered as rebuttal.

2 Q If you presented statutory mitigating evidence, what
3 theory could the State have used to introduce those
4 statements that would not violate Mr. Bush's confrontation
5 rights?

6 A I don't know.

7 Q What specific evidence did the State have that you
8 were aware of at the time to rebut mitigation based on Mr.
9 Bush's family history, history of poverty?

10 MR. BARTMON: That's been asked and answered,
11 Judge.

12 THE COURT: What's the question again?

13 MR. NOLAS: What specific evidence was Mr.
14 Muschott aware of that the State may have had to rebut
15 mitigation based on Mr. Bush's history of poverty?

16 THE COURT: Objection is sustained. Let's don't
17 rehash your earlier questions. If you've got some specific
18 area of cross-examination that you'd like to clear up--

19 MR. NOLAS: I never realized all of that, Your
20 Honor.

21 THE COURT: -- I'll be glad to hear that.

22 BY MR. NOLAS:

23 Q The various decisions you made at the time that you
24 discussed with Mr. Bartmon, is it fair to say that all of
25 those decisions were based on what you knew then and what

1 you had then?

2 A Right.

3 Q And you can't tell us today what your decision would
4 have been back then based on different facts, if there were
5 different facts involved in this case that you were aware
6 of?

7 MR. BARTMON: Objection, Your Honor. That's the
8 basis of their whole claim.

9 MR. NOLAS: I don't understand that, Your Honor.

10 THE COURT: I'm not sure I do either, but --

11 MR. BARTMON: Their whole claim is based upon
12 information they say should have been presented.

13 THE COURT: Yes. Well, I think it will be asking
14 the witness to use some sort of hindsight at this point if
15 he had all of this information that you would like to
16 present and had presented under the theory that if he had
17 done more investigation, he would have had this
18 information, I presume. Now you want him to say what he
19 would have done if he had had the information.

20 MR. NOLAS: No, Your Honor. I just want Mr.
21 Muschott to tell us that that question cannot be answered
22 today with hindsight as a factual matter. I know it's
23 there in stone as a legal matter, but I just want to know
24 from Mr. Muschott.

25 THE COURT: Well, it's obvious the answer. You

A Right. I think that was the criminologist portion.

Q Well, I think the record can speak for itself in that regard.

A Okay. That's right. Yeah. I haven't seen that particular motion for Dr. Tingle.

Q He never was evaluated?

A Right.

MR. BARTMON: Asked and answered, Judge.

THE COURT: Yeah, that's been established.

BY MR. NOLAS:

Q If Dr. Tingle had evaluated Mr. Bush and the results of that evaluation would have been devastating, could Mr. Bush have been in any way harmed by that?

MR. BARTMON: Objection. Calls for speculation.

THE WITNESS: No.

THE COURT: Well, you know --

THE WITNESS: I'm sorry, Your Honor.

THE COURT: We are -- I don't know. I guess he can answer that, but I think it's really a matter of argument. I don't think this witness' opinion at this stage of the proceeding has much probative value on that issue. But he's answered the question.

BY MR. NOLAS:

Q You indicated that Mr. Bush appeared to be cold, appeared to be ruthless, I think was another word you used.

A Did I personally think he deserved it?

Q Yeah. In 1984.

MR. BARTMON: I fail to see the relevancy of that.

THE COURT: I fail to see that either. You want to argue that?

MR. NOLAS: I could argue it, Your Honor. I think it is relevant. The attorney's personal feelings is relevant to his perspective of the case.

Let me rephrase that, Your Honor. Withdraw it.

BY MR. NOLAS:

Q Did you believe that this was a case which was proper for the death penalty?

MR. BARTMON: Asked and answered, Your Honor.

THE COURT: Well, he has testified that he felt that the State had a strong case. Isn't that your feeling?

THE WITNESS: Yes, sir. Strong case, right, from an evidentiary standpoint, particularly in the guilt phase.

MR. BARTMON: I think he also testified about the penalty phase.

THE COURT: Objection is sustained.

MR. NOLAS: Yes, Your Honor.

THE COURT: It's already been covered.

(Pause in the proceedings)

THE COURT: If it takes this long to think about

1 the next question, it probably shouldn't be asked.

2 MR. NOLAS: No, Your Honor. What I'm doing is
3 I'm skipping over about 15 of them to try to streamline
4 things for you.

5 BY MR. NOLAS:

6 Q What specific evidence did the State have that it
7 could have used to rebut the statutory mitigating
8 circumstance relating to a defendant's capacity?

9 A To capacity?

10 Q Yeah.

11 MR. BARTMON: I think this has been asked and
12 answered.

13 THE COURT: Well, I think --

14 MR. BARTMON: I'm not trying to be obstreperous,
15 but I really think that's been asked and answered.

16 THE COURT: Well, he's pretty well told us what
17 information he was aware of that the State had. And I
18 think -- I don't know whether it was specifically asked as
19 to that state of mind if that's what it is, the capacity.
20 I don't remember it being asked as to that specific issue.

21 MR. BARTMON: Well, I recall -- I don't recall
22 then if that's the case that that was covered on his
23 direct.

24 THE COURT: I don't either, but go ahead and
25 answer it.

1 contemplate from a nonstatutory point of view, that
2 practically anything could have conceivably have opened the
3 door to that.

4 Q And in 1982, you didn't have any of those
5 circumstances to balance against the '74 case, did you?

6 A I'm sorry?

7 Q In 1982, you didn't have any evidence of those
8 mitigating circumstances to balance against that '74 case?

9 A You mean positive evidence?

10 Q Yeah.

11 A Right.

12 MR. NOLAS: If I may just have a moment, Your
13 Honor.

14 (Pause in the proceedings)

15 BY MR. NOLAS:

16 Q You indicated during cross-examination that you
17 thought the State was saving its heavy artillery for
18 rebuttal. What was that again? What was that heavy
19 artillery you referred to?

20 A Well, details of the '74 incident, attempting to get
21 in statements by the co-defendants regarding involvement in
22 the '82 incident, and that type of thing.

23 Q Did you -- before Mr. Bush testified, did you have
24 occasion to go over his testimony with him at any time?

25 A You mean in the sentencing phase?

Q Yeah.

A No, I didn't have an opportunity because it was a last second decision on his part.

Q Did you do a question and answer type of thing with him before that?

MR. BARTMON: Objection, he just --

THE COURT: He has told us that Mr. Bush was going to follow his advice and not testify until they both stood up and he said he had changed his mind. So how could he have had a question and answer session with him.

MR. NOLAS: At any point. At some point early on.

THE COURT: He said to that point he was not going to; isn't that correct?

THE WITNESS: Yes, sir, that's correct.

THE COURT: So, obviously he didn't have -- don't waste our time now with those kinds of questions.

MR. NOLAS: Yes, Your Honor.

BY MR. NOLAS:

Q When was the decision first made that Mr. Bush should not testify?

A When was the final decision made or when was my first recommendation?

Q First recommendation.

A After I heard the third tape, I began talking to him

her under a subpoena.

Q Did you ever depose her?

A No.

Q Was she available there at the penalty phase? Did you see her there?

A I don't know if she was present or not.

Q Were you familiar with what happened to her after that 1974 case, with where she resided, whether it was in Florida or elsewhere?

A The only information I had about her was what I had learned about her being under continuing psychiatric care.

Q Did the State on their witness list list any witnesses relevant to that 1974 case other than the two parole type officers they put on?

THE COURT: By the way, they were just custodian witnesses. They didn't testify to any facts about that case, did they?

MR. NOLAS: Well, I think their testimony should speak for itself, Your Honor.

THE COURT: I'm asking you. You've read it.

MR. NOLAS: Yes. I think they did.

THE COURT: You think they did?

MR. NOLAS: Yes.

THE COURT: Well, I just looked at that over lunch and I didn't think so. Are you sure?

MR. NOLAS: The sentence came out. Some of what was discussed with Bush was --

THE COURT: Well, yes, but that's all -- you seemed to make a statement earlier before lunch that -- or at least led me to believe that you interpreted their testimony at the sentencing phase, that is the probation officer -- and who was the other witness?

MR. NOLAS: That was a parole officer and I think a law enforcement officer.

THE COURT: Yes. And that their testimony would have permitted Mr. Stone to make some of the arguments that he made in his closing. I don't think that's right. Do you think that's right?

MR. NOLAS: Yes, Your Honor. They said it was a forcible rape. They said it was a forcible robbery. They said it was a violent offense. They said it was --

THE COURT: Well, I don't know that that would permit some of the things that were said. Well, I'll look at it again, but I'm not sure I agree with your characterization of that.

MR. NOLAS: Yes, Your Honor.

BY MR. NOLAS:

Q Mr. Muschott, specifically who was listed on the State's witness list other than these two folks we're just talking about relevant to the 1974 offense?

1 A My recollection is that they listed the victim. I
2 could be wrong about that.

3 Q If the victim's name is not on the witness list, could
4 that be an indication that the State was not going to call
5 her?

6 A Well, I --

7 THE COURT: Well, what is the State rule in
8 regard of the filing of witness lists for rebuttal
9 witnesses?

10 THE WITNESS: A rebuttal witness as an
11 impeachment witness is not required to be listed.

12 MR. NOLAS: I disagree, Your Honor, but we can
13 take that up as well.

14 THE COURT: Well, I don't require it in Federal
15 court, if you don't know about a rebuttal witness. I don't
16 know what they require. What is it in Martin County?
17 That's what's important.

18 THE WITNESS: Well, the rule down there is
19 they're not required unless it's planned impeachment or
20 planned rebuttal. In other words, if they actually know
21 that something is going to be presented and they know that
22 they're going to use this witness. And then it depends on
23 the circumstances.

24 BY MR. NOLAS:

25 Q Did you ever attempt to depose any witnesses from the

1 1974 case?

2 A No.

3 Q Did you ever see any of them down at the courthouse?

4 THE COURT: Didn't he testify earlier that the
5 only information he had about this was from the Public
6 Defender, Mr. Schopp?

7 THE WITNESS: Yes, sir.

8 THE COURT: Isn't that correct?

9 THE WITNESS: Yes, sir. I wouldn't have known
0 the victim if I had seen her. I don't know what she looked
1 like. She might have been there and I didn't recognize
2 her.

3 BY MR. NOLAS:

4 Q Any motions for costs or anything like that that were
5 filed that you saw regarding transporting witnesses for the
6 1974 case to Mr. Bush's trial?

7 MR. BARTMON: Objection per your comments, Judge.
8 He's testified to what he knew about that crime.

9 MR. NOLAS: I'm not asking a knowledge question,
0 Your Honor.

1 THE COURT: The objection is sustained.

2 MR. NOLAS: Thank you, Judge. I have nothing
3 further.

4 THE COURT: Thank you, sir. You may step down.

5 THE WITNESS: Thank you, Your Honor.

NO 93-6431

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

JOHN EARL BUSH,

Petitioner,


vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, Celia A. Terenzio, a member of the Bar of this Court, hereby certify that on this 18th day of November, 1993, a copy of the APPENDIX TO Petition for Writ of Certiorari in the above-entitled case was furnished by United States Mail to: BILLY H. NOLAS, ESQUIRE and JULIE D. NAYLOR, ESQUIRE, P. O. Box 4905, Ocala, Florida 34478, counsel for the petitioner herein. I further certify that all parties required to be served have been served.


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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 25, 1993

Billy H. Nolas
P.O. Box 4905
Ocala, FL 34478

Re: John Earl Bush,
v. Harry K. Singletary, Secretary, Florida
Department of Corrections
No. 93-6431

Dear Mr. Nolas:

The petition for a writ of certiorari in the above
entitled case was docketed in this Court on October 18, 1993
as No. 93-6431.

A form is enclosed for notifying opposing counsel that
the case was docketed.

Very truly yours,

William K. Suter, Clerk

by

Melissa A. Blalock
Assistant

Enclosures

SUPREME COURT OF THE UNITED STATES

**JOHN EARL BUSH *v.* HARRY K. SINGLETARY,
SECRETARY, FLORIDA DEPARTMENT OF
CORRECTIONS**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-6431. Decided January 10, 1994.

The petition for a writ of certiorari is denied.

JUSTICE BLACKMUN, dissenting. I am inclined to agree with Judge Kravitch, concurring in part and dissenting in part, 988 F. 2d 1082, 1093 (CA11 1993), and would grant certiorari on the issue whether counsel rendered effective assistance as required by the Sixth and Fourteenth Amendments.